

**'Language and Text in Adjudication and Dispute Settlement
in Administrative Tribunals and Related Settings'**

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'Why do you demand explanations? If they are given to you, you will be once more facing a terminus. They can not get you any further than you are at present.

... the solution of the difficulty is a description, if we give it the right place in our considerations. If we dwell upon it, and do not try to get beyond it.

The difficulty here is: to stop.'

Ludwig Wittgenstein

'Zettel' (58, S315, S314)

Abstract.

This thesis has four main objectives; a) to provide an understanding of Legal Aid Appeals Tribunals, from a description of individual cases and the activities that occur therein, focusing in the main on those at which an appellant and/or their representative is present; b) to explore the use of documentation in the tribunal practices of tribunal panel members, legal aid clerks, appellants and their representatives; c) to explore the possibilities that post-analytic ethnomethodology as the adopted research methodology allows, and to clarify what this radical research 'programme' entails; and d) taking legal positivism as an epistemic to explore its possible ethnomethodological respecification in light of the descriptions of practice in legal aid tribunals.

Although this thesis explores the possibility of post-analytic descriptions it is not a theoretical investigation into post-analytic ethnomethodology, but an empirical investigation of phenomena of legal aid tribunals which allows an exploration of the practical application of post-analytic ethnomethodology. Nevertheless, some clarification is attempted of just what a post-analytic ethnomethodology may entail. Used in conjunction with the description of the use of texts in legal tribunals, the investigation of epistemics, though not a common research practice does here help develop our understanding of the situated nature of legal practical, legal decision making, and legal objectivity. In a wider sense this approach highlights an argument made throughout this research, that texts are both significant and researchable as they are utilised in everyday practices, and do not have to be researched solely with reference to an isolated reader and an isolated content.

Acknowledgements.

This research is a culmination of a number of years as student of sociology, in which I have never regretted my choice of subject. I have been fortunate to receive two ESRC awards whilst a student, and this study is the direct result of one of these and the indirect result of the other. So to the ESRC I take my hat off. For direct academic encouragement I am indebted to Prof. Robert Dingwall and Dr. David Greatbatch, my doctoral supervisors whose support included involved the encouragement to explore many ideas without any compulsion to study only their own specialisms. For this, and much more I am grateful.

I have been fortunate enough to be a student at the University of Nottingham at a time when the School of Social Studies brought together an number of people whose interests revolved around ethnomethodology and conversation analysis. This brought me back together with previous colleagues and introduced me to new, this was both productive and enjoyable - to all, past and present at WIT, cheers! I am also indebted to those persons, some of whom encouraged and some of whom inspired me, whom I met both inside and outside the boundaries of the University of Nottingham. I have indeed been shown much kindness.

This research could not have been undertaken without the cooperation of members of the Legal Aid Board, and I am especially grateful to those members who acted as clerks at the tribunals and whose welcome made my fieldwork so enjoyable. I am also grateful to the other tribunal members and appellants whose cooperation and tolerance was so forthcoming.

Finally, gratitude must be acknowledged to my family and friends, for just being there has been support enough. Though I am especially grateful to my friends Martyn Hudson for there is no doubt that he has been a good one, and Jon Hindmarsh with whom I have conferenced with, studied with, and holidayed over the past seven years. To K. everything. And so may it long continue..

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Foreword.

The concerns that initially drove me to start this study originated when an undergraduate reading Sociology and Social Research at Newcastle Polytechnic where, for my research dissertation, I attempted to look at textual interaction. Taking academic disputes in sociology periodicals as its data the analysis culminated in the modelling of rhetorical reference structures across the texts. This concern with rhetorical structures also informed the dissertation of my first Master's degree when reading Sociology of Contemporary Culture at the University of York. The focus here moved to temporal aspects of the textual interaction across articles, the main finding being the limitation of such an approach to texts. My second Master's dissertation, written while reading Research Methods at the University of Surrey, involved the evaluation of a quantitative computational text analysis programme on newspaper articles. The results of this study indicated that such programmes could not by themselves tell us much about texts, and nothing about textual interaction if not supplemented by some form of qualitative textual analysis.

It was during a year back at what was now the University of Northumbria teaching Methods of Social Investigation, and considering how to apply the continental analysis of Barthes, Derrida, Foucault and others that the current research project took form. The inspiration for this came not from the above authors, but from a television programme about inmates of mental institutions who, after having been committed up to fifty years previously, were found never to have been mentally ill. The question was asked of these ex-inmates why they had never said anything at their Mental Health Review Tribunals. Their replies indicated that they had been on the whole intimidated by, among other things, the usage of written documentation by the various professionals at the tribunal. These, often poorly educated people, reported being intimidated by processes which they had little insight into and no way of greatly influencing. This exclusion was expressed most obviously in relation to access to the various texts.

The result of reflection on this situation led to the realisation that the importance of the texts was not only in their content, but also their deployment in specific situations. Consequently, it became apparent that to understand textual interaction, investigation should be of texts interpreted by members of society in naturally occurring situated activities rather than by researchers or computer programmes. The development of this conception led to a research proposal obtaining funding from the Economic and Social Research Council,¹ and the production of this thesis under the supervision of Prof. R. Dingwall and Doctor D. Greatbatch.

The proposed research was very exploratory in its conception, and this has remained a feature throughout. The research methodology was anticipated as being ethnomethodologically informed though the final adoption and adaption of a post-analytic approach has been very reflexive process.

¹ ESRC grant award R00429334169.

Chapter One - Introduction.

The aim of this research is to provide a description of the phenomenon known collectively as 'legal aid tribunals'. Phenomena, by definition, are plural, yet, as is taken as the fundamental base-line of this research, each occasion of a phenomenon is unique. An underlying aim of this thesis has been not loose sight of the implications that this fundamental observation has on such a research project as this, i.e. a 'sociologically' based description of a number of phenomena collectively, and common-sensically, understood as representing a single type of phenomenon.

At its most basic level this thesis aims to present to the reader, who it is presumed is unlikely to be familiar with Legal Aid Tribunals, with a series of descriptions of individual cases, i.e. phenomena. But, and crucially so, without having distorted through abstraction the individual and unique occurrences of the phenomenon. Although due to the necessary analytic requirements imposed on a doctoral thesis the main body of data descriptions are located in an appendix rather than the main body of the text.

1.1 Description of Research.

The research, sanctioned by the Legal Aid Board, is an inquiry into the decision making processes of legal aid appeal tribunals by Area Committees in their processing of claims against the decision by the Legal Aid Board Area Office to grant, or allow the continuance of, Civil Legal Aid.

The research consisted of the observation, recording and collection of the textual materials from a number of legal aid appeal tribunals. The tribunals are from three locations within one of the twelve area offices covering England and Wales. It was initially thought that ten tribunal sittings¹ would provide enough material for the research to move to the description stage. However,

¹ Each sitting would hear anything from ten to thirty individual cases, although the number of attended cases would tend not to exceed ten.

due to some access problems related to consent forms (discussed below), the actual number of tribunal sittings attended was fifteen. The data collection consisted of non-participatory observation (to the extent that one can be a non-participant in situated action) and audio recordings of the tribunals themselves, the collection of the relevant texts pertaining to the individual cases, and some ethnographic work necessarily involved in orchestrating the research activity itself. This coordination was principally with the clerks, qualified solicitors who the Legal Aid Board area office supply to the local legal aid tribunals, who oversee the administrative smooth running of the tribunals and return with the panel's decisions on individual cases to the area office. The research is therefore informed by informal discussion and interaction central to the successful completion of inquiries of this type. The data thus provided allows an ethnomethodological description of verbal and textual contributions in processing of legal aid tribunals.²

1.2 Access.

Access to these tribunals was negotiated with the central office of the Legal Aid Board in London and a Legal Aid Board area office during the period October 1995 to October 1996. The length of this period was due largely to the sensitive nature of the subject matter of the research and the need by the Legal Aid Board to protect, as it is required by law, the privacy of its clients. Negotiations resulted in a contract between the Legal Aid Board, myself, and the University of Nottingham outlining the parameters of the research project and the dissemination of the research data and findings.³ The consent - although

² It should be noted that although the research methods have been described individually, each method will necessarily impact upon the others at the data collection stage, and also at the 'description' stage.

³ Consent by the Legal Aid Board central office involved: Firstly, the drawing up and signing of a contract in which the confidentiality and anonymity of all the parties to the research was to be guaranteed. Secondly, that, due to the sensitive nature of the research topic and the issues involved, only members of

this was informal and not on a signed consent form - and assistance of the Legal Aid Board area office also had to be obtained, as without their cooperation the research could not go ahead in any practical sense. However, after introductory meetings with one of the Legal Aid Board area offices in which the nature of the proposed research was discussed, full cooperation and assistance was offered. The research project began in earnest in October 1994.

The consent of the individuals whose cases were being heard also had to be gained. This was stipulated by the Legal Aid Board as well as the 'codes of ethics' of the SLSA, BSA and others, a factor in the research which was to prove a bit problematic. Consent forms were produced and were sent out to appellants with other material from the Legal Aid area office when they were informed about their case and its hearing etc. However, the return rate for these forms was exceedingly low, the reason for this was felt to be that the consent forms just tended to get thrown-out without much consideration. Also presumed to be a factor was that the return of the forms required 'effort' on the part of the applicant to read and return the consent form. This problem was overcome by asking for consent from the appellant or their representative on the actual occasion of their hearing. This was not done by myself but rather by the tribunal clerk (member of the Legal Aid area office), the reasons being that it was felt that the tribunal clerk could explain that it was not part of the hearing and that refusal would in no way affect their application and hence lessen any pressure to allow access. This was felt to contrast favourably with refusing the researcher face to face, which was perceived to be more difficult as the researcher obviously has an interest in obtaining the cooperation of the appellant. Further, it would have been impractical for the researcher to obtain consent as it needed to be obtained when other cases were in progress and the researcher necessarily otherwise engaged.

the research team will have access to the relevant tapes and texts relating to each case. Thirdly, that at the end of the research project all material relating to the research not contained in the theses or related reports, shall be destroyed, i.e. tapes wiped and legal documentation shredded.

Although gaining consent from the appellant was very successful in this manner, as most were more than willing to participate in the research once it was drawn to their attention, it was only possible to gain consent and access to the cases which involved some form of representation. Thus cases which did not involve any attendance did not occasion the possibility for gaining consent in this manner. Hence only a limited number of unattended cases were observed.

In the original outline of research agreed with the Legal Aid Board and the Legal Aid Board area office it was arranged that, for those cases for which consent had been acquired, access to the relevant texts would be provided approximately seven days prior to the relevant tribunal. This in effect meant being sent at the same time as the tribunal panel members the documents that they receive to read prior to the cases being heard. However, due to the consent for the research in most cases not being gained until the day of the hearing, the documentary material accompanying the cases was generally not provided by the Legal Aid area office until after the event when access had been confirmed. Although it was not felt that this made any significant difference to the research process.

1.3 Research Sites.

The actual type of venue for the tribunal hearings varied depending on the location. The Legal Aid Board does not have its own offices in the region away from the area office and so venues are negotiated locally, and hence vary in type depending on availability. One location was a regional Law Society office's conference room, another was a courtroom in a town's County Court, and a third was a church hall.

Although the building type and venue 'status' changed depending on location the actual internal layout tended to be very similar. The tribunal panel of four would tend to sit in a row facing the appellant and/or their representative, although on occasion one of the panel members may be located

to the side at a ninety degree angle depending on the size of the table(s) everyone sat around. The clerk from the Legal Aid Board area office would usually sit to one side of the table at a ninety degree angle. I would either be at a similar location on the opposite side of the table to the clerk or, more usually, sat three or four feet back from the table at about a forty-five degree angle facing towards the panel.

It is worth noting that I was always wearing a suit, would be already seated when an applicant entered the room from the waiting area outside, and would not appear much different from the clerk and lawyers on the panel. This was felt to cause the minimum amount of distraction to the tribunal process.

The Clerk and panel members would all have piles of documentation in front of them while I would be sat with a note pad taking notes throughout, a tape recorder was placed in the centre of the table between the panel and the appellant. The tape recorder was of a Dictaphone type and hence fairly small and inconspicuous. Certainly no appellant drew attention to it and panel members only rarely so, usually only when the tape was being changed or when they were talking about informal or 'sensitive' topics, as they attended to them, between case hearings.

1.4 Outline of thesis.

After this Introduction the literature review in Chapter Two covers a number of areas starting with an outline of the historical and statutory material surrounding legal aid, viewing disputes and tribunals in a broader perspective before returning to research on legal aid. We see how the focus on language and law provides a suitable orientation that may be adopted towards the investigation of tribunal, and that the ethnomethodological perspective is a highly recommended research strategy in this area.

In the following chapter, Chapter Three, we shall try and clarify what ethnomethodology is, what post-analytic ethnomethodology is, and how both have been adopted and adapted to our research concerns. Initially we will focus

on the research 'method' of ethnomethodology by concentrating on Garfinkel's 'Studies in Ethnomethodology' (1967a) locating some focal points of reference for this thesis. It will be suggested that a fuller understanding of Garfinkel's ethnomethodology can be obtained when viewed in relation to the similar 'ethnomethodological' projects that developed alongside and from his initial work, and we will briefly look at the cognitive sociology of Aaron V. Cicourel (1973) and the conversation analysis of Harvey Sacks (1992). Returning to the work of Garfinkel we shall look at the current nature of his work as reflected in the 'studies of work' programme, and contrasting this with formal analysis methodology, note ethnomethodology's concern with the description of the methods members use to produce phenomena of order*. Following this we move to a focus on the post-analytic position of Lynch and Bogen (1996), noting their concern with 'epistemics'. We will refer to Lynch's (1993) programme for research and describe how this has been interpreted and implemented in this thesis.

Chapter Four, the main data chapter, initially discusses the way in which the data in the thesis is to be presented is described; the form of presentation being very much part of the whole methodological orientation of the research and not separate. Following this, Section Two instead of an overview in which we gloss the work that is done in the tribunal, presents instead two 'perspicuous instances', one of an unattended case and one of an attended case. These two cases are presented and described separately. From the 'attended' case it is noted that the tribunal members display attention to four 'phases' in the tribunal, these are summarized as: 1. Discussing the case and deciding on what to ask the appellant; 2. Discussing the case with the appellant; 3. Considering the case and coming to a decision, and; 4. Delivering the decision of the panel to the appellant.

This chapter continues with a third section which explores some of the activities that occur in Legal Aid Tribunals which were not present in the two 'perspicuous' cases of the second section. Again, rather than through the use of glosses actual instance from the data are presented to the reader, here use is

made of data segments although full case transcripts and description are provided in Appendix Three. A fourth section attempts to provide a corrective to the development of the four phases described above, this is to illustrate that the 'four phases' can not be adopted as an all encompassing descriptive model. Reference is made here to the work of Zimmerman (1971) as an illustration from 'perspicuous' cases.

Chapter Five investigates the 'epistemic' of legal positivism as both a theoretical position and a practical orientation by legal practitioners. Beginning with a review of legal positivism and its critics, the focus moves to the issue of legal decision-making and the positivist approach to this referencing the empirical data of this thesis. It is then suggested that some of the seemingly intractable debates surrounding legal positivism can be clarified via an ethnomethodological respecification of the epistemics around which much debate centres. Such a respecification, it is argued, is not the adoption of either scepticism or relativism, but an attempt to understand what legal 'objectivity' is. Such a move, it is suggested, inevitably leads us to re-evaluate the view of objective legal decision making within the positivist/relativist debate. This position is illustrated from both the work of jurors and scientists in studies by Garfinkel (1967a, 1967b) and Livingston (1993).

Chapter Six concentrates on the role of textual documentation in the legal aid process and reviews a number of studies and commentators who have researched textual documentation claiming some influence from, or orientation to, ethnomethodology. In reviewing this material it is suggested that much of it appears to be methodologically problematic, this is not a claim that these studies are without merit but a highlighting of the degree of difficulty involved in such projects. We shall see that both Dorothy E. Smith and A. W. McHoul amongst others have, to a greater or less extent, had significant insights about why the use of textual documentation needs to be investigated, but have had problems in designing and carrying-out coherent research programmes. It will be suggested that the research that comes closest to addressing our research interests and methodological concerns is that deployed by Lynch and Bogen

(1996). This chapter then investigates specific instance of textual usage in Legal Aid tribunals and it is suggested that we can see that the documents provide not a single representation of events, but provide for a number of representations which are situationally invoked and deployed by the various participants. It is suggested that these representations, although invoked during the on-going situated interaction may also relate to varying temporal periods depending upon the concerns of the participants. This data not only confirms some of the observations made about the 'simplistic' view of representation adopted by legal positivism made in Chapter Five, but also highlights methodological problems raised with regard to the investigation of texts by investigations discussed earlier in the chapter. It also suggests reasons why tribunal panel members prefer appellants to attend tribunals, in that by doing so they can help unravel what the texts are intended to represent as appeal documents.

In the concluding discussion of Chapter Seven we cover the four main areas of concern for this thesis: a) to provide a description of the activities that can occur in Legal Aid Tribunals, b) to explore the use of documentation in the tribunal practices of tribunal panel members, legal aid clerks, appellants and their representatives; c) to do so through the adoption and adaption of a post-analytic ethnomethodology, and d) to apply this to an epistemic discussion of legal positivism.

As is noted through this thesis that the post-analytic ethnomethodology that Lynch and Bogen advocate, is both relatively recent, and I suggest, methodologically sophisticated, radical, challenging and not yet fully worked out. Part of this thesis has been concerned with an exploration and explanation of this 'methodological'. As a result of this the conclusion contains within the discussion of post-analytic ethnomethodology my view of what can be understood, or at least what I have understood by it.

It will be necessary to then enter into a discussion of the possibility of post-analytic description, and how its 'post' analysis rather than 'anti-analysis' can

be applied in practice. The point to be stressed again here is that this is all very exploratory. Finally, comment is made upon the 'policy' implications of this thesis.

The review presented in this chapter focuses on the presentation of a coherent picture of the existing literature relevant to this thesis. Any review in such circumstances is destined to be only partial as the amount of material published of potential relevance is extremely large. The aim has been to use the literature review to orientate the reader to the central concerns of the thesis and in doing so it has been necessary to neglect much material on jurisprudence, the philosophy of language, the history of science, the sociology of science, the sociology of law, critical legal studies, literary criticism and much more besides which has in some fashion influenced this thesis.

At times the discussion necessarily covers the literature in a broad fashion, at others it is more in-depth. Initially we shall look at legal aid before moving on to disputes and their resolutions in general. The next topic is that of tribunals and then specifically legal aid tribunals. Following this we move to the issue of language and law where a case is made for the use of ethnomethodology as suitable research method for this thesis.

2.1 Legal Aid.

The current form of civil legal aid as a means of financing legal action in Britain has its origins in the Rushcliffe Committee which reported in May 1945. Civil legal aid was to replace the Poor Persons Procedure, but was also to be available to those of moderate means. Depending on ones wealth it would be free or there would be a requirement of some form of contribution (Hansen 1992:85). Unlike the changes to the provision of health services that the welfare state brought about, the structure of the legal profession remained largely unchanged. This was due to the committee adopting almost in whole a reform plan put forward by the Law Society, the solicitors own representative body. In this the Law Society was the administrative body handling the day-to-day running of the scheme, and remained so-doing until the Legal Aid Act of 1988

which transferred it to the newly formed Legal Aid Board.

There has been a considerable erosion of eligibility for the award of legal aid since it was first set up, although the 'poor' have always been, and still remain, eligible for free legal aid. However, those of 'moderate means' initially included in the scheme have been dramatically reduced as a percentage of recipients over the past two decades, to the extent that eleven million adults lost their eligibility for civil legal aid between 1979 and 1990⁴ (ibid:88). On 12th April 1993 further tightened means-testing resulted in millions more people losing their entitlement to legal aid (Hansen 1993:9), when Lord Hailsham as Lord Chancellor was the first to actively to reduce eligibility. As part of the same cost-saving exercise remuneration for solicitors was also cut. The reason for this was due to rapidly increasing legal aid expenditure which had soared from a net £191.8 million in 1981/82 to an estimated £698 million in 1991/2, and to £857 million to 1992/3 even though eligibility had decreased. The cost increase being due to both an increase in the number of cases, and to increases in the average cost of each case. These cost increases might have remained less visible except for the fact that the budget for criminal legal aid moved from the Home Office to the Lord Chancellor's Department (LCD). This made that growth more obvious, relative to the comparatively small budget of the LCD. On the civil side, a rising divorce rate and increased home ownership have led not only to more cases but also to more complicated and protracted property disputes (Hansen 1992:87).

Over recent years the future of the legal aid scheme has been a major subject of concern and speculation. Legal aid work itself was seen as the least profitable, or even as loss-making, work by a majority of solicitors in a survey conducted by the Law Society Research and Policy Planning Unit in 1989. But since the 1960's onwards, it has also been seen as a central aspect of civil justice within the legal profession itself, embodied in the setting up by lawyers committed to the expansion and improvement of publicly funded legal services

⁴ Data from Michael Murphy, *Civil Legal Aid Eligibility Estimates 1979-90* (1990), quoted in Hansen (1992:88).

in 1971 of the Legal Action Group (LAG) (Ibid:91-93). This group now coordinates much of the campaign against the erosion of the legal aid scheme.

Since the start of the 1990's the legal system as a whole has been under various reviews, many of which have a direct impact on the provision of legal aid. At the same time the Legal Aid Board has introduced franchising into the provision of legal aid. Franchising, initially piloted in 1990 whereby solicitors offices take over aspects of the administration of legal aid from the Legal Aid Board area office, was initially criticized as an attempt to restrict the number of solicitor's offices dispensing legal aid for economic reasons, although it was recognised that such a move did offer potential for greater quality control (Ibid:97). The system is now almost fully in place, although it still runs alongside the previous system of area office administration, though changes to the provision of legal aid are by no means over and suggestions for the revision of practices are constantly being suggested.⁵

2.1a Legal Aid - An Outline of Process.

There are three main forms of legal aid, these are: Legal Advice and Assistance (also known as the Green Form scheme) which covers advice and help with any legal problem, and in some cases, under what is called Assistance by Way of Representation (ABWOR), also covers going to court; civil legal aid for when a case has to go to court; and criminal legal aid for some criminal offences.⁶ The Legal Aid Board administers Legal Advice and Assistance (including ABWOR) and legal aid for civil proceedings under the general guidance of the Lord Chancellor. For this purpose England and Wales are

⁵ An example of such a suggestion is that of the introduction of health services type reforms, as applied to District Health Authorities and budget-holding general practitioners for internal markets, be introduced by the Legal Aid Board (Carter and Forest 1992:30). Since legal aid, like health reform, is highly political it is likely that the new government will introduce its own reform programme.

⁶ As outlined in the pamphlet 'A Practical Guide to Legal Aid' (1994:2).

divided into a number of areas.⁷ Each area has a Legal Aid Board office and an area committee made up of practising solicitors and barristers.

The area office decides whether an application for civil legal aid satisfies the merits test. The merits test checks that the applicant "has reasonable grounds for taking, defending or being party to the proceedings... there are reasonable grounds if:

- (a) there is an issue of fact or law which should be submitted to the courts for a decision;
- (b) the solicitor would advise the applicant to take or defend proceedings privately, i.e. if he had means that were adequate to meet the likely costs of the case or would make payment of the likely costs possible although something of a sacrifice; and
- (c) the applicant shows that, as a matter of law, he has reasonable grounds for taking or defending proceedings, i.e. that there is a case or defence which has reasonable prospects of success, assuming the facts are proved." (Legal Aid Handbook 1994:58)

There is also a means test which is carried out by the Legal Aid Assessment Office.⁸ The area offices can either grant or refuse⁹ legal aid, but if applicants or their legal advisers are dissatisfied with the decision of the legal aid officials, they may apply to an appeals tribunal or area committee¹⁰ which

⁷ There are twelve area Legal Aid Offices covering England and Wales.

⁸ The Legal Aid Assessment Office is a part of the Benefits Agency and carries out a means assessment of the applicant's disposable income, capital and any contribution if they are eligible.

⁹ Apart from a merits test the case is also subjected to a reasonableness test, they can be refused on this even if they have passed the merits test. An application is "likely to be refused as unreasonable if:

- (a) the application reveals some illegal motive or the conduct of the applicant is such as to be unacceptable to the court (but moral character on its own is should not be a bar to a grant);
- (b) the proceedings are not likely to be cost effective, i.e. the benefit to be achieved does not justify the costs." (Legal Aid Handbook 1994:59)

¹⁰ Area committees do not have a static membership and each meeting of the area committees may have a different membership constitution - solicitors and barristers would register with the Legal Aid area office for them to be entered

deals with appeals against refusals of legal aid. If they are still dissatisfied they may seek an appeal for judicial review, for which legal aid is available if criteria are met.¹¹

The administration of criminal legal aid is the responsibility of the Lord Chancellor (A Practical Guide to Legal Aid - Pamphlet 1994:3). The provisions relating to legal aid are contained in the Legal Aid Act 1988 and regulations made by the Lord Chancellor. Part III of the Act covers Advice and Assistance (including ABWOR), Part IV covers civil legal aid and Part V covers criminal legal aid (Ibid:4).

2.2 Disputes and Resolutions.

Legal aid as both a concept and practice is situated within the domain of literature on disputes and their resolutions, as such it will be useful to have some familiarity with this area before continuing. Many socio-legal studies take as their focus 'disputes' and use 'dispute' as an analytical category,¹² but it must

onto the committee rota of members. Further area committees do not meet in one location in the area but rather in a number of locations usually dealing with local cases. For the area of this particular research there were five locations spread throughout the area that committees would meet at. Each area committee tends to be constituted from the practising solicitors and barristers of that locality.

¹¹ Of interest here is the advice given to solicitors in one of the texts that acts as a guide for practising solicitors with regards legal aid:

"In taking a particular decision, officials may be following policy - or they may be taking an arbitrary action. If the latter, a complaint to the official's superiors may be more effective and quicker than a formal appeal under regulations; if the decision was based on policy, the Board may be persuaded to change that policy." (Hansen 1993:11)

This form of 'appeal' is however, outside the orbit of this research project.

¹² Trubek (1980-81a:494) justifies his use of a disputes focused approach by stating a concern for the social relations and conflicts behind the formal structures of the lawsuit. Such abstract concerns always needing the use of theoretical concepts.

be realised that a 'dispute' is something carved out and constructed from ongoing activity. Also, that a "Dispute overlaps but is not co-extensive with civil lawsuit. Not all lawsuits are disputes, and few disputes become lawsuits" (Trubek 1980-81:489).

While we must remain aware of the theoretically constructed nature of the concept of a dispute,¹³ it will be informative to look at some of the literature which references phenomena in this way. For instance, disputes have been seen to be normative claims to entitlement whose validity has been contested. However, for grievances to become disputes they must be communicated to a person who denies validity, or refuses to satisfy, the claim.¹⁴ Hence disputes are seen here in the context of grievance processing" (Lempert 1980-81:708-711).¹⁵

A much more rigorous approach to the notion of disputes is taken by Robert L. Kidder (1980-81) who believes: "What we need to know is how the mechanisms for dispute processing, both formal and informal, get created, modified, and incorporated into the strategies of competing interests"

¹³ The construction of 'disputes' is not just an issue at a theoretical level as Edelman, Abraham and Erlanger (1992) report that the theoretical construction of disputes by lawyers and legal theorists actively shapes organisational structures and responses.

¹⁴ Kritzer (1980-81) has a similar definition of disputes as grievance processing, and one bearing similarities to the occurrence of a dispute that goes to a legal aid tribunal:

"We conceptualized a dispute as a social relationship created when someone (an individual, a group, or an organization) has a grievance, makes a claim, and has that claim rejected. A grievance is a belief in entitlement to a resource which someone else can grant or deny. A claim is a demand or a request for the resource in question made to a person or organization with the ability (at least in the mind of the claimant) to accept or deny the claim." (Kritzer 1980-81:510)

¹⁵ Lempert is interested in the implications of effective or ineffective and biased or unbiased systems of dispute settlement. This critical socio-legal research although not without interest, is not of central concern to this thesis, neither are the associated discourses on power and justice at the macro-social level, although Legal Aid is often discussed in these terms.

(ibid:724).¹⁶ Kidder advocates the dropping of the 'dispute processing' terminology which he sees leading to functionalist research strategies and the recognition of the ideological nature of dispute settlement (ibid:725). While Kidder too is concerned with macro issues such as access to justice, power and class dynamics, he nevertheless recognises the need for a focus, at least initially, on the actual practices of dispute processing. From the above we can see why Trubek (1980-81b) notes disagreement among commentators on the use of 'dispute' as a conceptual link between legal and social phenomena. Trubek states in relation to these differences that the "problem is not one of method, in the narrow sense of surveys versus observation, but one that reaches to the nature of social research itself" (ibid:3-4).

An important observation on the nature of disputes is that made by Felstinger, Abel and Sarat (1980-81) in their article 'The Emergence and Transformations of Disputes: Naming, Blaming, Claiming', when they observe that:

"In the conventional view of disputes, the sources of claims and rejections are objective events that happen in the past. It is accepted that it may be difficult to get the facts straight, but there is rarely an awareness that the events themselves may be transformed as they are processed". (ibid p637)¹⁷

Nevertheless, for transformations to occur they must be actively done through the practices of individuals throughout the career of a dispute, and these practices must be researchable with reference to situated activities not the abstractions of general models. Though such research will not answer the

¹⁶ An example of what this might reveal is give by Edelman, Erlanger and Lande (1993) who illustrate how disputes in Civil Rights Law issues in the workplace get recast as managerial problems. The paper also illustrates how Alternative Dispute Resolution can actually undermine legal rights.

¹⁷ Miller and Holstein (1995:57) suggest that a form of a dispute "might change so radically as it shifts interpretive locales that it may be problematic to treat it as the same dispute in different settings."

questions that Felstinger, Abel and Sarat had in mind for such research.¹⁸

A related research issue is that much of the research in the socio-legal field, whether focusing on disputes or not, is concerned with legal reform either for social or financial reasons. Such research requires methodological precision in obtaining systematic data about law, and calls for vastly different personnel and material resources from 'classical' legal research focusing upon case decisions, statutes, commentary, and other documentary sources of law then applied to legal theory (Rosenburg 1980-81:474-475). Rosenberg like many others displays a limited view of the types of research methods that might be brought to bear, nevertheless it will be informative to look at some of these studies to see the methods used and the analytic tools deployed.

Kritzer (1980-81) identifies three fundamental sampling units: the case, the institution, and the participant, noting key aspects and limitations of each and concluding "the utility of a mixed strategy to dispute processing." (ibid:504-505) Coming from the Critical Legal Studies tradition Kritzer's approach, allowing as it does the validity of ethnographically orientated research, is more open in the type of methods to be used than some more traditional socio-legal research which rely upon quantitative research methods. Nevertheless, Kritzer's methodological recommendations depend upon imposing a predetermined methodology upon the phenomena. Increasingly many socio-legal studies now employ a combination of methods in their research, often in an attempt to overcome the perceived limitations of one method over another, rather than because the phenomena under investigation drives such an approach. Vidmar (1984) for example reports an empirical study of a Canadian small claims courts and notes the use of random sampling of cases, the use of

¹⁸ Their hope for such research being that:

"By directing attention to dispute antecedents, the study of transformations should illuminate both the ways in which differential experience and access to resources affect the number and kinds of problems that mature into disputes and the consequence for individuals and society when responses to injurious experiences are arrested at an early stage (e.g. depoliticization, apathy, anomie)." (Felstinger, Abel and Sarat 1980-81:649-650)

interviews with both plaintiff and defendant before the hearing, the observation of cases that went to trial, and the use of follow-up interviews. These contemporary social-legal research methods being combined with the more classical legal research method of examining of court records.

Socio-legal research frequently seems to focus on the reasons for behaviour, whether on macro concepts such as economic factors shaping basic decisions affecting the careers of disputes (Johnson Jr. 1980-81), or less tangible concepts such as the management of uncertainty (Flood 1991). Studies using ethnographic methods have highlighted the role of interaction, noting for example that "Corporate lawyers spend roughly 55 percent of their *chargeable* time in some form of talk with others" (Flood 1991:48).¹⁹ The focus on language in socio-legal studies is especially evident in studies of ADR practices such as mediation. Cobb and Rifkin (1991) in their study of neutrality in mediation examined neutrality as a discursive practice with a focus on the management of stories. In this instance the analysis highlighted "the surface, the definitions, metaphors, semantic frames, and narrative content that are specific to the way mediators 'talk' neutrality" (ibid:37). In such research the use of video or audio tapes is a necessity for any real understanding of the talk, which otherwise could not be recorded adequately. Cobb and Rifkin used a Foucaultian perspective, and though analysis of recordings in such research varies with different methodological perspectives the importance of such focuses on the language of law is its anti-foundational shift, as Cobb and Rifkin (1991) state:

"The shift from a foundational to a poststructural perspective on mediation requires, as we have noted, a shift in our understanding of the nature of language - from the notion that language *represents* reality toward the notion that language *constitutes* reality. The shift focuses attention on the process in and through which meaning is managed, the way that dominant discourses are brought forth, reconstituted in practice, and contested; and how alternatives to them are marginalized and, on

¹⁹ Throughout this thesis, unless stated otherwise, all emphasis within quotations belong to the original texts.

occasion, transformed". (ibid:50-51)

In recent years there has been a lot of interest in aspects of disputing involving less distinctively "legal" processes and personnel (Fitzgerald and Dickens 1980-81), tribunals often being seen as representatives of such alternatives. This can be seen in the context of there being an incalculable number of disputes and resolution practices occurring in society which may be more or less institutionalised. Where resolution practices are institutionalised it is often the distribution of financial resources which will affect the manner in which parties may approach disputes (McIntosh 1980-81:841), the idea of legal aid of course being to overcome such disparities. However, this support is often seen to be a process by which disputes are pushed into a legal arena, and there is some concern about this legalisation, although admittedly more emphasis is given to the cost of this process. Nevertheless, the movement of disputes into the legal arena is seen by some as not necessarily an undesirable outcome since this both legitimises action, and shapes the objective possibilities of success should action be taken (Miller and Sarat 1980-81:527). However, they stress that "availability is not accessibility" (ibid:540).

The issue of accessibility and the desirability of legally minded dispute settlement which led to the introduction of legal aid in post-war Britain, was also an issue in the U.S.A. where lack of money to bring or defend a court case, was felt to be preventing many disputes from being adequately settled (Hurst 1980-81:443). To a greater, or lesser extent, through legal aid and Alternative Dispute Resolution (ADR) initiatives in allowing adequate provision, concern has moved towards their quality. However, such a move needs to be taken with caution for, for as Bush (1989) notes in relation to ADR:

"ADR is not an alternative to the courts [and] the litigation/ADR distinction is more fiction than fact... the litigation/ADR dichotomy obscures the many important distinctions between *different* ADR processes, lumping them together as if ADR was one homogeneous institution set apart from the courts". (Ibid:342-343)

Clarity is needed here to avoid imprecise characterizations of processes, through the adoption of ready-made categories. If looking at a singular dispute resolution process, whether court based or ADR, we need to know the process thoroughly itself rather than assume some process due to categorization practices in the literature. While I am not rejecting some notion of generalisable goals common to disputes, they should not necessarily be prioritised over contextually situated practices. This calls for a more focused research into decision-making practices than a broad generalising, and here our focus is on tribunals, and legal aid's administrative tribunals in particular.

2.3 Tribunals.

The majority of administrative tribunals in existence at present are a result of the Welfare State which had its origins in the National Insurance Act of 1911,²⁰ and the social security programme of the post-war government and the policy of increasing regulation (Wraith & Hutchinson 1973:39). Although a minority originated during the industrial revolution e.g. the adjudication processes in the development of the railways, with only the General Commissioners of Income Tax surviving as an example of a tribunal system of any great antiquity (ibid:17). Presently more than fifty tribunals are overseen by the Council on Tribunals, although a small number of tribunals exist outside of this regulatory system.

The growth in the number of tribunals within the Welfare State led to the Franks Committee on Administrative Tribunal and Inquiries of 1955, which reported in 1957. The report identified the tribunals as a new phenomenon existing on the borderline between Administration and the Judiciary, and

²⁰ "In an earlier measure - the Old Age Pensions Act of 1908 - the Liberal Government had learnt from the discouraging experience of workmen's compensation and had avoided the courts, placing the administration of the scheme in the hands of 'pensions committees' of the major local authorities. An appeal against their decisions lay first to the committees themselves and thence to the Local Government Board". (Wraith & Hutchinson 1973:33)

resulted in raising the status of such tribunals. The Report itself emphasised the social, as opposed to the legal, requirements of natural justice and highlighted citizens' rights, although the Report has been criticised for failing to see the potential scope of a tribunal system and making recommendations on such a basis. Instead, "The Committee apparently saw itself as merely initiating a review of tribunals, of beginning a task which would be continued by the proposed council [Council on Tribunals]" (ibid:41-42).

Contemporarily, it is the social aspect identified by the Franks Committee that has been felt to be under threat in the tribunal system, ironically, just as tribunals and Alternative Dispute Resolution (ADR) systems in general have become high profile in areas from matrimonial to commercial disputes. This threat is especially felt to be the case in the ever more court-like industrial tribunals, where cheapness, speed and informality have been undermined by a long-term trend towards legalism (Lewis and Clark 1993:7). However tribunals appear in relation to the courts, it is claimed (Hasenfeld et al. 1987) that any encounter that a member of the public is likely to have with a tribunal will take the form of as bureaucratic interaction with welfare state system. Although as rights under the welfare state are not universal and services are not equally distributed, with welfare bureaucracies having correspondingly varying administrative structures and processes, such encounters will be as diverse in nature as the welfare services themselves. These structures and processes influence the content and form of the bureaucratic encounter.²¹ Hasenfeld et al. nevertheless believe four dimensions to such encounters are

²¹ Hasenfeld et al. note with regards to the diversity the Welfare State:

"Although the term 'welfare state' is a loosely used term, it is possible to stake out some general boundaries of the concept. In the definition guiding most empirical research, the welfare state refers to the non-market, governmental provision of, or direct funding of, consumption needs in such areas as income, housing, and health care. Core programs are income programs for the elderly, medical care, unemployment subsidies, and various forms of public assistance". (1987:389)

Though some care is needed in the acceptance of such boundaries as they have already be described as rhetorical constructs.

identifiable:

"(a) the social correlates of the demand for services that is linked to the extent of rights to and awareness of the sector's services; (b) the sector's structure, which includes the universality of its domain, the scarcity of its services, and the administrative control over them; (c) the sector administration, which refers to the discretion of officials and their level of professionalization; and (d) the norms governing the bureaucratic encounter." (ibid:399)

While these should therefore also be applicable to Legal Aid provision, the are at a level not the focus of this research, more directly relevant is the observation that Welfare Sector processing of people involves the bureaucratic activities of:

"(a) determination of the organizational jurisdiction over applicants and their needs; (b) a determination of eligibility to organizational goods and services; and (c) a determination of the amount of goods and services to which the applicant is entitled." (ibid:401)

From this we can gather that a member of the public's encounter with such a Welfare bureaucracy encounter initially revolves around information processing. The bureaucracy will have developed a decision-making system that circumscribes practice, with a concern for universalism, predictability, and accountability, although usually without eliminating all discretion. Importantly, such systems often allow applicants to challenge the system's decisions through an appeal procedure, as is the case with legal aid. The appeals processes themselves tend to be passive mechanisms which must be activated by members of the public pro-actively. This activation varies from service to service in the Welfare system, and certainly it appears to be the case in the area of legal aid that appellants for services may be informed and encouraged by their solicitor. This does not of course mean that motivation and commitment is evenly

distributed either among appellants or solicitors.²² The issue of the effect of a solicitor on tribunal proceedings and outcomes, and not just legal aid tribunals, has been a salient issue in debates on civil justice, and consequently a concern for the Council on Tribunals.

In its annual report²³ for 1994/95 the Council on Tribunals²⁴ reports on the Green Paper²⁵ entitled "Legal Aid - Targeting Need", which discussed the then governments intended changes for the delivery of legal aid, changes intended to improve access to justice. The Council acknowledged that it had no "legitimate basis for offering comments" on the provision of publicly-funded legal services, but maintained an interest in proposals for the public funding of work in the area of social welfare law contained in the Green Paper, and "invited views on whether this should include the funding of representation at those tribunals whose jurisdiction covers that category of work" (Council on Tribunals 1995). Without going into detail of the Council's views on the Green Paper, on the question of whether legal aid should be available for representation in non-court based proceedings including tribunals, the Council stated:

²² Legal aid is not dependent solely on the proactive efforts of the appellant as: "Failure to advise a client who is financially eligible about legal aid would probably amount to a breach of the solicitor's duty to act with reasonable skill and care, and would therefore be actionable on the part of the client...failure to do so could lead to a finding that the solicitor had provided inadequate professional services, and in serious cases a finding of professional misconduct, as well as giving rise to a claim in negligence". (Hansen 1993:1)

²³ The Annual report of the Council on Tribunals 1994/95, London, HMSO.

²⁴ The Council on Tribunals was set up by the Tribunals and Inquiries Act 1958 and now operates under the Tribunals and Inquiries Act 1992. It is a body which exercises supervision over some seventy-three systems of tribunals in the United Kingdom. Although, rather ironically considering its concerns over legal aid, not the Legal Aid Appeals Tribunals.

²⁵ A Green Paper is a command paper containing policy proposals to be discussed by the British Parliament.

"We were firmly of the view that it should. We welcomed the recognition given in the paper to the importance of the research in this area conducted by Hazel and Yvette Genn, and reminded the Government of the main findings of the Genn Report, as detailed in our 1989/90 Annual Report, and of their direct relevance to the issue in question." (ibid:7)²⁶

In their 1989/90 Annual Report (Council on Tribunals 1990) they note that in response to the Legal Aid Act 1988, their Annual Report for 1987/88 registered concern at the Act's lack of provision for legal aid to those attending tribunals. They state that they believed that the reason for this was due to the Lord Chancellor's commissioning of research on this issue by Genn and Genn, and that it was unlikely to come to any decision before that report was complete (ibid:9). In the 1989/90 report the Council discusses the Genn and Genn Report (1989) and their discussion with Hazel Genn, they state: "The Report provides incontrovertible evidence not only of the importance of representation at tribunals, but also of the need to ensure that the formality and complexity of certain tribunals is taken into account when deciding what level of representation should be appropriate" (Council on Tribunals 1990:10). That success at tribunal was "significantly affected by the fact of representation and by the quality of representatives coming before tribunals" and that "Poor representation has a detrimental effect on the conduct and outcome of hearings..." (ibid:11).

The Genn and Genn report itself, entitled 'The Effectiveness of Representation at Tribunals' (1989), was a result of research commissioned by

²⁶ So as not to misrepresent why the Council believed that representation was a desirable thing, it is to be noted that they state "...we continue to come across major deficiencies in the provision of effective advice and representation, leading to examples of unmeritorious cases clogging the lists, of unnecessary and wasteful adjournments or delays because parties are poorly prepared or ill-equipped for the hearing and, most disturbingly apparent, of prejudice to the outcome through the absence of effective representation" (Council on Tribunals 1995).

the Lord Chancellor's Department²⁷ following the Legal Aid Scrutiny of 1986 and a White Paper²⁸ in 1987. The Scrutiny had "envisaged a planned approach to advice and tribunal representation which would make 'effective use' of the skills of lay advisors and solicitors", but the White Paper required research into the effectiveness of representation at tribunals before any extension into this area of law (ibid:1).²⁹ The questions underlying the research were: "are represented cases more likely to succeed?; and, if so, what is it about representation that causes cases to succeed, or what is it about tribunals that renders representation necessary or desirable in producing successful outcomes." (ibid:4) Briefly, the study was a comparative one investigating the operation of four types of tribunals: Social Security Appeals Tribunals; Industrial Tribunals; hearings before Immigration Adjudicators; and Mental Health Review Tribunals. Data was collect in the form of; quantitative data analysis of tribunal files, observation of hearings, and interviews.

In their summary³⁰ Genn and Genn report that:

"Interviews with appellants and applicants conducted at tribunal hearings have provided evidence of the extent to which representation can reduce the difficulties faced by appellants and applicants in pressing their cases, increase participation in the process and contribute to the feeling that appellants and applicants have had a fair hearing. Interviews also provide evidence of the extent to which representation can make the process of losing tribunal cases more acceptable to appellants." (ibid:242)

²⁷ The Lord Chancellor is a Cabinet Minister in the Government and is head of a department that has responsibility for the judiciary in England and Wales, and also responsibility for legal aid. Legal aid had previously been the responsibility of the Home Office.

²⁸ A White Paper is an official government report which sets out the government's policy on a matter that is or will come before Parliament.

²⁹ Legal aid is available for some tribunals such as the Mental Health Review Tribunals.

³⁰ This is only a limited discussion of the their findings. The summary includes a large number of findings and gives policy recommendations.

In all the tribunals examined the presence of a representative was found to significantly increase the probability of a successful hearing, although this increase is only significant where the respondent³¹ is unrepresented (ibid:243). Other factors were found to be associated with success and these included the type of case, the number of witnesses, and geographical location (ibid:244). However, what will be more interesting for us here is their finding that:

"The experience of representatives is that unrepresented appellants and applicants are disadvantaged at tribunal hearings because there is an imbalance of power between the parties, because appellants and applicants do not understand the law, are unable to present their cases coherently and are unaware of the need to furnish the tribunal with evidence of the fact that they are asserting." (ibid:244)

It was also felt by tribunal members that representation made their job easier (ibid:245). Genn and Genn conclude that, unless representatives are seen to allow unmeritorious claims to succeed, representatives improve the accuracy of the tribunal decision making process. Further, and significantly, that:

"Representatives do this by furnishing tribunals with the information needed to reach decisions, based on all the relevant facts of the case, and on the law that relates to the case. In investigating cases, obtaining evidence, and advocating cases, representatives are ensuring that appellants whose cases have merit, are given the best possible chance of succeeding before the tribunal." (ibid:247)

In this current study we are not interested in the fairness or otherwise of tribunal decision-making processes, or the role of representation in achieving this. Rather our concern here is what it is that representatives do and how they

³¹ A respondent is "a person against whom a petition is presented, a summons issued, or an appeal brought" (Osborn' Concise Law Dictionary:290).

In the legal aid tribunals there is no respondent as such as the respondent is in effect the Area Legal Aid Board who have assessed the claim and refused it. Although no respondent is actual interviewed by the tribunal panel, the panel may at times direct questions to the tribunal clerk who is a member of the legal aid office which has assessed the application.

achieve it. From Genn and Genn, it is suggested that representatives coherently 'furnish' tribunals with information, "relevant facts", and "on the law which relates to the case". What we are not told though, and it was no doubt not Genn and Genn's intention to do so, is how they actually do this. To do this the research methodology needs to look at the 'law-in-action', which as Travers (1996) observes needs a qualitative approach which may involve specialised methodologies focusing on action, such as symbolic interactionism, ethnomethodology and conversation analysis. Such approaches allowing us to see what the work of the representative is, and how they go about achieving it. Such an approach being applicable to the description of Legal Aid tribunals.

2.4 Legal Aid Tribunals.

We have already covered some aspects of legal aid previously and noted that this aspect of the Welfare State, like most others has been under the spotlight of reform over the past few years. Much of the literature about the reform of legal aid has concerned itself with the ongoing debate about the reform of Civil Justice under Lord Woolf. A review of how this debate has developed in the 1990's can be obtained through three texts produced by the Legal Action Group edited by Roger Smith: 'A Strategy for Justice: Publicly Funded Legal Services in the 1990's' (1992); 'Shaping the Future: New Directions in Legal Services' (1995); and 'Achieving Justice: Appropriate Dispute Resolution for the 1990's' (1996). The theme of these texts is a pro-active debate on the provision of social justice, with the provision of legal aid as an essential component of this provision. The texts are wide ranging including: the history of legal aid (Smith 1992:3-30), current trends and changes (Smith 1995:7-42), and developments in other countries (Smith 1995 and 1996). However, actual research into the delivery of legal aid is unfortunately not reported. One reason for this is that there is little research into the delivery of Legal Aid to report, although an exception to this is Young and Wall's (1996) edited collection 'Access to Criminal Justice: Legal Aid, Lawyers

and the Defence of Liberty'. This is a wide ranging collection of essays from a largely critical perspective, although the focus is on criminal legal aid rather than civil as in this thesis. The study in this collection of closest relevance to this thesis, although crucially on criminal legal aid rather than civil legal aid, is that reported by Adrian Wood (1996) in 'Administrative Justice Within the Legal Aid Board: Reviews by Case Workers and Area Committees of Refusals of Criminal Legal Aid Applications'.³² This study of legal aid refusal by the magistrates' courts notes that there are two routes that can be taken in appeal against this decision. The first of these is a re-application back to the court,³³ and the second being appeal before the area committee of the legal aid board. This process is different from that of civil legal aid in which refusal is not by the court but by the Area Legal Aid Board itself, although similar in that both types of appeal are dealt with by one area committee, i.e. there are no separate panels for criminal and civil cases. This practice of both types of appeal being heard by the same area committee, is in fact one of the criticisms made by Wood of the system, as he believes his study shows that area committees tend to be made up of practising solicitors knowledgeable about civil law practices, but not so knowledgeable about criminal law practices.

The article covers a number of the Legal Aid Board's practices in handling Criminal Legal Aid, though of direct interest is the observation of eight area committee meetings. Wood's comments, regarding professional practitioner dominance of the review process,³⁴ that "It is clear from the

³² Wood's paper is based upon research undertaken by Wall and Wood (1994) discussed below.

³³ A study report of the practices of court clerks in deciding on legal aid to applicants at court is provided by Richard Young (1996).

³⁴ Unlike appeals against Civil Legal Aid decisions which go to tribunal, the Criminal Legal Aid appeals, although they go to the same area committee, are termed 'reviews'. The reason apparently being that, a decision of the court going to an appeal tribunal was perceived to reflect badly on the judiciary, however since civil legal aid decisions are not by the judiciary but by legal aid clerks the term 'appeal tribunal' was seen to be unproblematic.

documentation used for the appeal process that the area committee review system is designed to be used by professionals for the benefit of professionals" (ibid:173). An opinion which we may assume to be applicable to civil legal aid also. Woods, however, does note two significant differences between civil legal aid and criminal legal aid appeals: firstly, that the civil legal aid appeals tend to have their appellants invited to attend, which is not the case for criminal cases; and, secondly, the criminal legal aid committee does not get to see the documents before the case appeal. These are I suggest quite significant differences, as will be seen in the case descriptions of this thesis.

Central to Wood's critique of criminal legal aid is the lack of any uniformity in criminal legal aid decision-making, and he gives the statistics from six area offices to illustrate this. This lack of uniformity is seen by Wood to indicate injustice being perpetuated by the system, and he indicates that this is somewhat due to the lack of guidance from the Legal Aid Handbook as to Criminal Legal Aid appeals decision-making, Civil Legal Aid being better covered. To illustrate this finding Wood states that:

"At the time of the survey, full and detailed reasons for granting or refusing legal aid were advanced in only two of the 2,716 files perused. In all other cases decision-makers merely invoked a statutory criterion without further explanation to the applicant." (ibid:185)

Without doubt the conclusion of Wood is that legal aid decision-making, in criminal cases, is inconsistent, without criterion, and uninformed by the practices of the courts which it relates to.

Wood's study is an interesting and informative one, however in relation to this thesis it is one of its flaws which proves most interesting. This flaw is that while it comments, as we have seen above, on the area committees' decision making practices, they have not been investigated in any depth. Wood did engage in observation, but comments on these add up to a few quotes from clerks on their practices and the observation that each 'review' "rarely took longer than 45 seconds to consider" (ibid:176), possibly Wood felt that there

were no practices of any substance to describe. Nevertheless, a major problem that I detect in Wood's research is that he felt he could adequately infer from the reports of the clerk to the area committee decisions. That because detailed reasoning was only recorded by the clerk on two occasions, citation of statutory criteria being used on all other occasions, that this reflected actual decision making practices. As we will see below, this is to grossly misunderstand the nature of bureaucratic documents usage and practice. However, at this point it is worth noting that since Civil Legal Aid cases usually take much longer than forty-five seconds, they are more likely to be an observable phenomenon than in Criminal Legal Aid review proceedings. Though as to what they may look like Wood cannot inform us.

Wood, along with David Wall, had conducted an earlier piece of research for the Economic and Social Research Council 'The Administration of Criminal Legal Aid in the Magistrates' Courts of England and Wales' (Wall and Wood 1994), upon which the above (Wood 1996) was largely based. This study was a comparative analysis of four Magistrates Courts and their associated Legal Aid Board Area Committees, the aims of the research being:

- "a) to research into the extent to which the present structure of administering legal aid leads to delay, inefficiency and inconsistency.
- b) to respond to legislative and administrative developments arising since the original research proposal was submitted and broaden the scope of the research to fully evaluate the effects of the Criminal Justice Act 1991 on Legal Aid decision making.
- c) to suggest a model to overcome any perceived limitation in the system, in order to promote greater efficiency, consistency and fairness." (Wall and Wood 1994:12)

The research methodology being; the collection of statistical hard data which is then elaborated upon by reference to the soft data of qualitative interviewing and observation.³⁵ Whilst their research methods did not involve

³⁵ Wall and Wood (1994) also used 'decision making exercises' as a form of investigation in the attempt to validate their findings, however, this technique suffers in its possible relation 'real world' situations and its critique is covered

the actual recording of the situated activities of the area committees themselves, and they have little to say on the practices of the committee members, they do give us an insight into what to such research might expect to find:

"On the whole, the discussion of cases by Area Committees tended to be un-focused and based on a combination of hearsay, and commonsense. Rarely did detailed consideration the s.22 criteria occur, and if it was granted, the clerk to the Committee was usually left to suggest a suitable criterion to support the decision." (ibid:37)

Although based upon their limited observations this indicates that even in the 'limited' Criminal Legal Aid 'reviews' by the Area Committees there will be some interesting activities to describe.

What I suggest that these to studies illustrated is that to understand the legal aid appeal tribunal processes we need to focus on the practices themselves, and at a level at which the basic phenomena of interaction within bureaucratic institutions operate.³⁶ Further, and what these studies do not illustrate, is that the investigation of such Welfare bureaucracies will involve having regard to the written documents which are the life-blood of such systems. Dingwall (1992:163) with regard to process evaluation puts the point succinctly:

"Process evaluation demands a methodology which is capable of capturing the dynamic aspects of the organisation rather than simply logging its movement from one point in time to another. This can only be accomplished from the inside, by watching and listening and by studying the documents by which its members produce to orchestrate or justify their activities."

the 'Hawthorne Effect' of experiments in social psychology. This is why there is a preference for actual juries rather than mock ones (see Baldwin and McConville 1979).

³⁶ Bogoch (1994) looks at legal aid in Israel with a focus on the interaction between legal professionals and clients. But in terms of relevance to our study here, apart from being a different legal system, the interaction is not of an appeal tribunal but of that within the lawyers office, and is concerned to model power relations based upon discourse strategies.

Thus our focus would seem to need to be on the spoken and written word in Legal Aid Tribunal practices. Such a focus however, opens up a whole field of legal scholarship to review, the subject area known as 'Language and Law'.

2.5 Language and Law.

This area of legal studies is now quite substantial, fortunately there are a handful of reviews of area as a whole and by going through these in temporal order we can cover a large area initially and become more focused later in this chapter.

The first of these review articles, Danet's (1980) 'Language in the Legal Process', focuses on the interrelations between language and law and the cross-disciplinary research studying how language relates to the functions of law in society. While Danet seems to view linguistics as the only form of language study, she does draw attention to linguistic philosophy's concern with the issue of 'meaning as object' and 'meaning as act', of which she notes:

"In its most extreme form, the former view holds that meanings are either entities in the mind or sounds corresponding to entities in the external world....This view, which dominates the thought of Russell (1956) and the early Wittgenstein (1961), underlies the logical positivism of twentieth-century natural and social science and has been the object of sharp attack in recent years....A very different view of language underlies all contemporary work on language in context. Wittgenstein came to reject the view of language just described. In his *Philosophical Investigations* (1968) and *Blue and Brown Books* (1964) he developed the concept of the *language game*." (ibid:456)

Although she mistakenly describes the latter view as 'constructivist' Danet indicates the importance of this view not only in legal discourse and theory but importantly, its centrality to phenomenological sociology, symbolic interactionism, ethnomethodology, and "even in scientific theorizing" (ibid:550).

At around the same time Mather and Yngvesson (1980-81) in 'Language, Audience, and the Transformation of Disputes' were also arguing against a static vision of language in law. Their central concern being with the ways in which disputes are transformed, and the role of the participants. Significantly, they note "that changes in the content of a dispute may not be distinguishable from changes in form, since the inclusion or exclusion of facts or issues affects the way options are articulated and solutions are perceived" (ibid:777). An observation that would seem to imply the uniqueness of individual disputes.

Four years later Goodrich's (1984) review 'Law and Language: An historical and Critical Introduction', while noting that on the whole lawyers and legal theorists have ignored the historical and social features of legal language, like Danet tends to view language research in terms of linguistics. Although he (correctly in my view) critiques legal studies as a discipline for using "deductive models of law application in which language is the neutral instrument of purposes peculiar to the internal development of legal regulation and legal discipline" (ibid:173). Both linguists and legal theorists have, for Goodrich, "viewed their objects of study as being the 'systems' or 'codes' that govern, respectively, language usage and law application as potentialities rather than empirical actualities" (ibid:174).³⁷ He believes that the reason for this has been the allure of clarity and "abstract verifiability in terms of propositional logic and presupposition" (ibid:181). Goodrich observes that this "sterility" was not evident in the earliest traditions of legal criticism which did not distinguish

³⁷ Goodrich (1984:179) notes: "As the foundation of linguistics, Saussure inserted the distinction between language -system (*langue*) and language use (*parole*) and argued that the status of linguistics as a science was dependent upon its restriction to the study of the laws of the language system as a normative ideal or synchronic (static) systematicity - as a set of logical universals, internally defined in a language totality conceived as a 'state of affairs' existing (notionally) outside of society and outside history."

law from the general rhetoric of discourse.³⁸ Mather and Yngvesson, like Goodrich, do not accept the separation of legal language from other discourses, and instead view language "as varying along a continuum, with everyday discourse at one end and highly specialized 'language of law' at the other" (1980-81:781). Goodrich recommends that:

"To understand the paradox of the social discourse of the law requires an interdisciplinary approach to legal texts as well as to the informal practices of the legal institutions, and will include the study of the rhetoric of law, and the analysis of the context and pragmatics of legal speaker and legal institution, the empirical examination of the functions and affinities of law viewed as communication and as function" (ibid:191).

As such we can see Goodrich advocating the language in action approach identified with the later Wittgenstein.

Stepping out of temporal sequence, Elizabeth Mertz's (1992) review essay 'Language, Law, and Social Meanings: Linguistic/Anthropological Contributions to the Study of Law' while noting the 'new' view of language, points out that it is not language alone that is important:

"There is a rich and complex dynamic that includes those aspects of language use but also includes the shaping of the interaction by discourse forms (appellate briefs, oral arguments), the complicated speech context of the institutional setting in general (the court), the influence of particular individuals involved in this instance (the judge, other court personnel, the attorneys, the litigants in this case), the *creation* of new meanings and relationships and contexts by on going oral and written communication." (ibid:419)

Stressing that the law is the confluence of both oral and written language, Mertz is also keen to emphasise the socially grounded and creative aspect of this convergence. In her review of past research she notes that this

³⁸ A similar point is made by Button with reference to the separation of logic as a topic from its original basis in ordinary discourse (Button 1991).

focus is most evident in process orientated research, especially that based upon ethnomethodology and conversation analysis.

The growth in the research over ten years in the area of language and law had been such that by 1990, Judith N. Levi (1990) in 'The Study of Language in the Judicial Process', was able to note the striking diversity of contributions to the subject area from the disciplines of anthropology, English literature, law, linguistics, political science, psychology, sociology - and various combinations of these to the study of language in legal processes. She notes three focuses: 1. the "law as a special context in which to explore patterns of linguistic organisation and use"; 2. where "the analysis is more an instrument for understanding the legal system than an object of inquiry itself"; and, 3. where "the primary emphasis is on society or culture or human psychology, as each of these may be revealed through the study of human language in the context of our legal system" (ibid:3-4).

She notes the expansion in this area of academic interest having occurred since 1975,³⁹ with little of this actually filtering through into the legal community.

This growth can be seen as a result of developments in language philosophy and its impact on other disciplines, but also in the development of sophisticated recording techniques for data collection, replication and verification. Post-Wittgenstein ordinary language philosophy having had a great impact epistemologically in the social sciences with the development of

³⁹ Levi (1994:iv) states:

"Until the 1970's, there was no academic field of "language and law" to speak of, neither from the perspective of legal scholarship nor from that of social science - despite the ready availability of Law Professor David Mellinkoff's now classic study, *The Language of the Law* (Little, Brown, 1963). This began to change in the 1970's, however, when a few social scientists (including those that formed the inter disciplinary Duke University Law and Language Project in the mid-1970's) began to recognise and appreciate the critical role that language plays in legal interactions, legal processes, and legal development - and to study that role empirically. As a result, by 1982 there was enough published scholarship to provide some 400 entries..."

alternatives to 'positivism', suggesting learning about the world by *discovering* its inherent order (ibid:10). Levi also notes the importance of the development of ethnomethodology within this new epistemological alternative to positivism, "whose commitment to careful analysis of naturally occurring social interactions has proven to be especially suitable for the study of spoken language in legal settings" (ibid:11). A defining characteristic being attention to the detail of the practices they describe. However, she notes that much of this has been conversation analytic studies of plea bargaining, courtroom discourse, and conversations entered as evidence in criminal trials, but that, and not just by ethnomethodology, written legal language has been less of a focus. Significantly, that which has been published "concentrates on analysing documents and texts, either for the purpose of improving their comprehensibility or for more purely theoretical purposes (e.g., stylistic and semiotic analyses)" (ibid:25).⁴⁰ Although she notes exceptions to this such as a special issue of 'Text' edited by Brenda Danet (1984) on legal language in both its written and oral forms.

The most recent and extensive review, 'Language and Law: A Bibliographic Guide to Social Science Research in the U.S.A.', is again by Levi (1994) although this second review is vastly more extensive. Discussing the many topics, disciplines, and methodological approaches of the bibliography together, she states that they all converge on the question of "How does the multidimensional linguistic phenomenon that is live spoken language interact with, and influence, the multidimensional social phenomena that is our judicial system?" (ibid:1).

We cannot discuss all of Levi's over-view of the now extensive research, but some of her observations are worth noting. Firstly, Levi remarks upon the skew in the research that has been carried out towards proceedings in

⁴⁰ This analysis of legal language in written texts independent of their situated use, is not a focus of this thesis. This form of text analysis, e.g. Westman's (1984) analysis of strategy in differing types of legal texts, will not be included in this language and law review.

formal courtrooms, with the consequent neglect of other areas (ibid:11).⁴¹ Secondly, and related to the first, that apart from a few early studies, the spoken language of lawyers amongst themselves has been ignored which, Levi notes, "is somewhat surprising since the same technological advances that made microanalysis of courtroom discourse possible could be used just as profitably in studying the patterns and implications of discourse among lawyers." (ibid:12) Finally, that the area of 'written language and the law' which ironically "is the one most lay people associate with 'language and law', apparently corresponds to the *smallest* amount of scholarly analysis of the three major categories in this bibliography" (Levi 1994:29). These three major categories being: Spoken Language in Legal Settings; Language as a Subject of the Law; and Written Language and the Law.

From these reviews of the language and law as both a topic and a body of existing research, we can see that emphasis has been put on the situated use of language, for it to be viewed as a dynamic process, and that it should not be isolated from the activities of which it is part, especially the use of written documents. Finally, it has been suggested by more than one commentator that the research methodologies influenced by the post-Wittgenstein studies of language, such as ethnomethodology, have provided some of the best examples of research in this area.

2.6 Ethnomethodological Socio-Legal Studies.

⁴¹ Levi notes in the discussion on the research into the discourse of plea bargaining that Douglas Maynard emphasizes that "our understanding of the role of language in the judicial process will remain hopelessly skewed if almost all the scholarly work on spoken language in legal contexts remains restricted to the trial proceedings in formal courtrooms" (Levi 1994:11). Though she acknowledges that one of the problems with informal settings research is the logistical factors of the research process. An example of research which the ethnomethodological perspective is employed in a non-courtroom legal context is Travers (1994). Here a ethnographic, rather than conversation analytic, ethnomethodology was employed. Such studies however, require extensive fieldwork.

Levi (1990) has indicated that much of the interesting research in the area of 'language and law' has been ethnomethodologically orientated, in this section we will look briefly at some of these studies.

Atkinson (1981) in 'Ethnomethodological Approaches to Socio-Legal Studies' notes it is impossible to adequately describe the range and complexity of the work that has been inspired by ethnomethodology in a single chapter. What was true in Atkinson's case is even more so here where we have even less space. Although like Atkinson we can say that what these studies can be seen to have done is to have examined everyday practices for deciding matters of fact and resolving disputes (ibid:211-212), and found that "it may be more sensible to look to places *other than* the legal definitions and procedures if one is to come anywhere near an understanding of what practices might constitute such competence" (ibid:215).

Barring the work of Harold Garfinkel which will work we focus on in the following chapter, possibly the most well known ethnomethodological study of law and language, at least in Great Britain, is Atkinson and Drew's 'Order in Court' (1979). Using conversation analytic (C.A.) ethnomethodology these studies provide, among other cases an analysis of the details of evidence given to the Scarman Tribunal (Tribunal of Inquiry into Violence and Civil Disorder in Northern Ireland in 1969), focusing on the work of the counsel and witness.⁴² However, this is an example of tribunal of inquiry set up by the government as a 'one off', and as such is significantly different from the tribunals 'of appeal against' that typify those under the jurisdiction of the Council on Tribunals and the Legal Aid Tribunals which are 'standing bodies'.

Pomerantz and Atkinson (1984) in their paper, 'Ethnomethodology,

⁴² Atkinson and Drew's data was not recorded by them, but came from the transcriptions taken during the tribunal by the clerks. The reliability of this form of transcript has been questioned by Walker (1986), who suggests that there may be some serious inadequacies with the recording of such data. Not in its use for those whom it is designed but as representations of original phenomena for social researchers. Beach's (1985) study discourse analytic study of 'time-travel' in legal discourse also suffers from the use of such transcripts.

Conversation Analysis, and the Study of Courtroom Interaction', a study of a London Small Claims Court describing the practices involved in presenting evidence in court, found that participants in a court hearing closely orientated themselves to the immediate local relevances of the interaction in which they were engaged. These relevances were not static as:

"...what counts as relevant for the participants may change during the course of an unfolding sequence of interaction is not only demonstrably the case; it is also one of the main reasons why ethnomethodological studies are centrally concerned with taking the interactional setting, or intermediate local relevances of particular actions, seriously into account." (ibid:295)

Context changes throughout a hearing and the impact upon the application of rules is illustrated by Pomerantz (1987), again using data from a Small Claims Court in London, when she notes the significance of even matters that are neither in dispute nor centrally relevant to substantiating either side's claims:

"These straightforward indisputable facts nevertheless are described differently on different occasions. These variations are not due to the conflicting interests of the parties but to differing uses of the descriptions within the course of the hearing" (Pomerantz 1987:226-227).

Whereas Pomerantz and Atkinson (1984) used audio tapes, Maynard and Manzo (1993) were able to use videotape in their single case study of jury deliberation to investigate the use of the term 'justice' as it is embedded in juror's practical reasoning. The result being the explication of "the use of 'justice' as part of a temporally situated, in-course, commonsense, lively, and contingent determinations of jury members" (ibid:174). The use of practical reasoning in legal decision making had been argued by Moerman (1973) in a study of Thai legal decision making. He argues that the results of legal reasoning are neither arbitrary nor accounted for by formal deductive logic, and he challenges "the adequacy of accounting for them by purely legal reasons"

(ibid:196).⁴³ This does not mean that there are not normative rules of relevance, "But, unlike what is conventionally called formal or mathematical logic, their application and accomplishment is informed by the social contexts in which they are used" (ibid:196).⁴⁴ This was a perspective adopted by Blimes (1981) in a focused way in his attempted to see how in legal discussion participants negotiate their relations to each other via the topic of discussion and how these are related to general goals. His aim being to do this with reference to conversational structure and development rather than personalities and attributed motives, and to display how conversation is used not just structured.

Pollner (1979) in 'Explicative Transactions: Making and Managing Meaning in a Traffic Court', while recognising the situated character of discussion and meaning cautions that: "While an outside observer may acknowledge that meaning is situationally constituted, whether or not defendants in the setting actually orient to, analyze, and use the explicated meanings and structures remains problematic" (ibid:237). The orientation to context has to be displayed and not assumed, methodologically it cannot be investigated through asking the interactants since, as Pollner footnotes:

"Mead's thought invites an interesting revision of the Durkheimian exhortation (1938) to 'consider social facts as things'. Durkheim was animated by the need to overcome the commonsense thinking which led to easy and loose theorizing about social process. Treated as things, social facts would be recognized as objective processes requiring close

⁴³ This is not an unopposed view, Caesar-Wolf (1984) argues against the ethnomethodological position believing that legal profession need their own frame of reference. Of the ethnomethodological stance she says: "Such an approach, in our view, is sociologically unsound since courts have developed institutionally, precisely to deal with those types of conflict which have proven insoluble in everyday life... Hence, differential pattern of communication must be expected as the normal form in court." (ibid:194) This criticism, and implicitly, the problems of a decontextualise content analysis which Caesar-Wolf advocates will be shown in the following chapter to be misconceived.

⁴⁴ This view of mathematical logic as independent of social context has been challenge and is seen to be crucial in the solving of Fermat's last theorem. My thanks to Martyn Hudson for this point.

and persistent examination. From a Meadian point of view, the commonsense perspective also poses a problem in that the primordial process character of meaning is often masked by the objectivated meanings it produces. Thus, as good members we are much more apt to see ourselves as reacting to meanings than as enacting them. To overcome the retrospective illusion of commonsense requires a conception of meanings not as things but as process." (ibid:253)

The conversation analytic approach of ethnomethodology is not without its criticism. In relation to Atkinson and Drew (1979), Mertz (1992) for example believes "this understanding of the effect of language on social interaction is limited by its focus on the immediate speech context" (ibid:425). Brennis (1988) also criticizes the conversation analytic approach stating:

"Such accounts as Atkinson & Drew's consideration of courtroom interaction in English courts, Philips' descriptions of Arizona courtroom speech, and Maynard's analysis of plea bargaining discourse provide invaluable data insights. They necessarily focus, however, on particular junctures in the course of conflict. While past events may be discussed and accounted for in court testimony, such language is *about* earlier stages; it does not produce what was actually said. The process perspective so central to contemporary legal anthropology is made irrelevant, and the range of events and practices through which disputes take their shape over time are necessarily neglected. The court as institutional setting is the focus; we see one of the last stages rather than the entire process of a dispute." (ibid:222-223)

While this may be a legitimate critique of C.A.⁴⁵ in terms of the objectives of legal anthropology, they are not necessarily ones which C.A. would feel it needed to address.⁴⁶ Nevertheless, if our aim is to provided a description of the

⁴⁵ Mertz is not critical of conversation analysis of language use as such, and notes of C.A.:

"The process demands scrupulous attention to transcripts; such phenomena as the management of turn-taking and inter-speaker continuity have been elegantly described and analyzed. Whether or not one agrees with their theoretical premises, these studies provide exemplary models for the investigation of discourse." (1992:228)

⁴⁶ Maynard (1983a) reviews three texts on language in court, one of which is Atkinson and Drew's (1979) the other two coming from anthropological and

legal aid tribunal as a whole, they are a methodological consideration we must note.⁴⁷

2.7 Summary.

Throughout this review we have seen the case made for a focus on the actual practices of dispute processing rather than some abstracted representation of them. Research into tribunals, notably that of Genn and Genn (1989), while raising concerns as to the effect of representation on the tribunal process has tended to use analysis that fails to investigate practices in situ. This being largely true of other research on legal aid tribunals, e.g. Wood (1996) not looking at area committees' decision making practices in any depth. Though Wood's comment that:

"On the whole, the discussion of cases by Area Committees tended to be un-focused and based on a combination of hearsay, and commonsense. Rarely did detailed consideration the s.22 criteria occur, and if it was granted, the clerk to the Committee was usually left to suggest a suitable criterion to support the decision." (ibid:37)

suggests that to understand legal aid appeals we need to focus on the practices themselves.

Scholarship in the area of 'Language and Law' (Mertz 1992) has emphasised the situated use of language to be viewed as a dynamic process that should not be isolated from the activities of which it is part, especially the use of written documents. And suggested that the research methodologies

political science perspectives. However he refrains from suggesting that one perspective is more informative than another, calling instead for further research in the area.

⁴⁷ I realise that there is a great amount of material not covered in this brief review, the work of Douglas Maynard (1982, 1983b, 1984a, 1985, 1988, 1989) on plea bargaining is obvious by its absence, but it has not, as indicated earlier, been possible to review here all the literature of interest.

influenced by the post-Wittgenstein studies of language, such as ethnomethodology, have provided some of the best examples of research in this area. In the following chapter we will look further into ethnomethodology as a research method and to understand how it can be deployed in this thesis.

Chapter Three - Towards a Post-Analytic Ethnomethodology.

"Our talk gets its meaning from the rest of our proceedings."
Ludwig Wittgenstein, 'On Certainty'.¹

We saw in the previous chapter that the research methodology that would appear most suitable for our investigations is ethnomethodology. This chapter outlines the ethnomethodological programme² and develops an interpretation of post-analytic ethnomethodology. Initially the discussion is of Garfinkel's (1967a) 'Studies in Ethnomethodology', highlighting aspects which are relevant to this thesis. As ethnomethodology differs from

¹ Ludwig Wittgenstein, 'On Certainty', No 229,:30e, Oxford, Blackwell.

² It is not the case that this chapter is going to be able to state what ethnomethodology 'is', at least in any fixed and definite sense. Ethnomethodology is a socially constructed entity continually under re-negotiation, the history of previous failed negotiations being that the present state consists of various disagreeing factions. This is not problematic in any real sense most of the time, the reflexivity recognised by ethnomethodologists to be inherent in social action, means that it probably could not be otherwise - it certainly does not prevent ethnomethodologists continuing with their studies. Though as consequence of this any description of a unified ethnomethodological position is problematic. Fortunately, I do not believe that such an object is necessary. Instead then, what this chapter provides is 'a' version of ethnomethodology, a version which influenced by some ethnomethodological commentators more than others. This version has been designed for, and reflexively influenced by, the application of my understanding of ethnomethodology, and the explanation of this application, in the research for, and construction of, this thesis. It will become clear that this thesis has been influenced by Michael Lynch's versions of ethnomethodology, or at least my understanding of his versions. I say versions rather than version, as his work is not static but continually developing - whether this is a progression or not, is an issue of negotiation in the ethnomethodological community at present. One of the aspects of this thesis is to come to some, if somewhat tentative, conclusions myself on this issue. The empirical needs of this thesis as a piece of research however, mean that this assessment is more of a by-product of the research rather than its central aim.

I am aware that I have critiqued material in the literature review apparently as if there was a unified ethnomethodological position, however, rather than assume there is a unified position I have been assuming that there are some 'central tenets'. Although I would not wish to assume these are static.

conventional/classical/formal sociological analysis it will be necessary to contrast the two positions and this is done in the section describing ethnomethodological studies of work. This is followed by a description the concerns of Michael Lynch and 'Post-analytic' ethnomethodology. The chapter concludes with a summary intended to highlight those aspects of ethnomethodology which are being drawn upon in this research. Ethnomethodology as it is conceived here is perceived to be of an essentially exploratory nature, especially in terms of its methodology, and this is reflected in its adoption here. Details of its interpretation and application in this thesis, along with its influence on the presentation of material, conclude this chapter.

3.1 Ethnomethodology.

Ethnomethodology³ cannot be seen as a singular research tradition having followed a singular line of development.⁴ It has branched at various times in its short, but eventful history to the extent that in 1981 Max Atkinson felt able to write "ethnomethodology has developed and diversified to a point where it no longer makes sense to treat the range of approaches now being pursued as if they represented an identical or unified theoretical orientation" (Atkinson 1981:201-203). By 1993 Lynch went as far as to say "Ethnomethodology has become an increasingly incoherent discipline, despite incessant efforts by reviewers and textbook writers to define its theoretical and

³ Michael Lynch states "Ethnomethodology can be described briefly as a way to investigate the genealogical relationship between social practices and accounts of those practices" (Lynch 1993:1). For a sophisticated, yet readable, description of ethnomethodology see Chapter 1 'Ethnomethodology', in Lynch (1993). It may not be a description that all 'ethnomethodologists' would subscribe to, but it is the version subscribed to most closely in this thesis.

⁴ "Although the term 'ethnomethodology' now tends to be used to refer to several related approaches to research, it was not originally intended to denote a social scientific methodology in the same sense that surveys, experiments, or participant observation are methodologies". (Pomerantz and Atkinson 1984:284) It was rather meant to relate to a topic for investigation.

methodological programme" (Lynch 1993:183). It is with these observations in mind that we describe the ethnomethodological 'position' adopted in this thesis. However, whatever the ethnomethodological approach one adopts there is only one starting point.

The origins of ethnomethodology stem from problems encountered by Harold Garfinkel while researching jury decision making processes for the Law School of the University of Chicago in 1954.⁵ The research data consisted of 'bugged' tape recordings and their transcripts of a jury room in Wichita. Garfinkel was to focus on the knowledge resources drawn upon and used by these jurors, and the methods by which they achieved their deliberations and 'findings'. Garfinkel invented the term 'ethnomethodology' to describe the methods by which a member of society uses the 'common-sense' knowledge of that society to make decisions and act. (Garfinkel 1974:15⁶, Livingston 1987:1-3⁷)

Ethnomethodology's historical development is not straightforward after 'Studies in Ethnomethodology' (1967a)⁸; there is cognitive ethnomethodology

⁵ See Kalven, H. and H. Zeisel (1966) *The American Jury*, Boston, Little Brown.

⁶ This chapter in Turner (ed) (1974) is an excerpt from Richard J. Hill and Kathleen Stones Crittenden (eds), *Proceedings of the Purdue Symposium on ethnomethodology*, Institute Monograph Series no. 1, Institute for the Study of Social Change, Purdue University, 1968, p. 5-11.

⁷ As Livingston (1987) states of ethnomethodology; "It was to be the 'study of people's methods,' of practical action and practical reasoning" (ibid:3). Although ethnomethodology did not originate as the study of the methodology but was a descriptive term *of* peoples methods.

⁸ Ruggerone (in an unpublished paper) presents Garfinkel's work as having three stages of development. The first is seen as being from 1952 till the mid Sixties and is marked by the heavy influence of Schutz's phenomenology mainly but also that of Parsons. The second stage comes with the writing of the first chapters of 'Studies in Ethnomethodology' and is dominated by an interest in natural language. Here the influence of Wittgenstein becomes evident. The third stage, which Ruggerone gives no date for, is associated with the notion of a radical reflexivity and indexicality, and a concern for epistemological issues.

work of Aaron V. Cicourel, the conversation analysis instigated by Harvey Sacks and developed by others such as Emmanuel Schegloff, and the 'studies of work' programme led by Garfinkel.

3.2 Garfinkel's Original Studies in Ethnomethodology

In 'Studies in Ethnomethodology' (1967a) Garfinkel states that the central "recommendation" of his text is that "the activities whereby members produce and manage settings of organized everyday affairs are identical with members' procedures for making those procedures 'accountable'" (Ibid:1). Meaning that members⁹ have accounting procedures by which they describe and understand the activities that they produce with other members in the situated activities that they engage in. Though these accounting procedures have a 'looseness', preventing them ever being fully spelt out. As Garfinkel summarises: "Members' accounts are reflexively and essentially tied for their rational features to the socially organized occasions of their use for they are *features* of the socially organised occasions of their use" (Ibid:3-4).¹⁰

Basically, the rationality of an account is not independent of that account, instead its rationality is constituted in and of that account. Therefore,

⁹ When Garfinkel uses the term 'member' he is not referring to a specific individual, rather it is used as a 'dummy variable'. "To talk about competencies that are tied to particular situations, Garfinkel employed the dummy variable 'member'. Just as infinity is not a number like other numbers in mathematics but is to be read as one anyway, so 'member' is not a person (or 'members' groups of persons) but serves the syntactic and semantic functions of one for the purpose of talking about competencies" (Schwartz and Jacobs 1979).

¹⁰ The need for reflexivity in investigations of social phenomena can be seen in the Wittgenstein inspired discussions of Winch (1958). Its form in ethnomethodology according to Ashmore (1989:32), "refers to a general and useful feature of accounting procedures. The essential reflexivity of accounts, as the phrase goes, is taken to reside in the mutually constitutive nature of accounts and reality." Although alongside this reflexivity of accounts, it is also used in relation to 'actors'. The 'reflexivity of actors' referring to the ability of actors to consider their own actions, in contrast to the 'cultural dope' model of actors.

every individual rendering of an account is unique, a uniqueness best understood in terms of the indexical nature of words and expressions. Not because they are indexical, but because indexical expressions are temporal phenomenon and it is temporal positioning that is unique; the same expression in another temporal position within an interaction does not necessarily make it a replica of the first. This uniqueness is not normally problematic for members who overcome this temporal indexicality by treating it as a practically situated issue resolvable from observable rational character of action by and for each member. Simply put, members while recognising the inherent reflexivity of their actions, and thus the difficulty in their 'objectification' for others, make observable the rationality of these actions to others. Although this is not necessarily a conscious effort, but part of the everyday 'communicative act' as "*recognisably* rational properties of their common sense inquiries - their recognisably consistent, or methodic, or uniform, or planful, etc. character - are *somehow* attainments of members' concerted activities" (ibid:10).

Thus understanding is achieved in such apparently unfavourable circumstances because of the order that is a property of both indexical expressions and actions, an order recognisable by cultural members going about activities with shared 'methods' of doing so. Methods which have both meaning and logic recognisable by other cultural members, it is to the study of these phenomena that Garfinkel give the name Ethnomethodology. However, although indexicality began to be seen as central to ethnomethodology Garfinkel eventually discarded the term as an indistinct concept, and its status now, as Lynch prosaically puts it, is as "a ticket that allows entry into the ethnomethodological theatre, and is torn up as soon as one crosses the threshold" (Lynch 1993:18).

Now we are in the theatre, so to speak, I would like to return briefly to the idea of 'looseness' mentioned earlier. What Garfinkel meant by this was that definitions and situated meanings could never be spelt out fully. The impossibility of this becomes clear when it is attempted, as each attempt

multiplies the features to be explained (see Garfinkel 1967a:24-31).¹¹ The best way to think of this is as a notion of adequacy in the sense that it is adequate for the task intended, i.e. for all practical purposes. This 'looseness' is not sloppiness however, and adequacy here does not mean that it *just* suffices, rather it means it adequately performs the job intended. Garfinkel explains this with reference to the work of members of the Suicide Prevention Centre (SPC) in classifying deaths for the coroner: "Thus over the path of his inquiry the investigator's task consisted of an account of how a particular person died in a society that is adequately told, sufficiently detailed, clear, etc., for all practical purposes" (ibid:15).¹² The importance of this, in terms of 'looseness', is especially significant for this thesis in relation to document use. Garfinkel discusses the work of coding medical documents by research students, and their necessary use of *ad hoc* considerations in deciding upon the fit between the documents and the coding frame. He states that:

"...if the coder has to be satisfied that he has detected a real clinical occurrence, he must treat actual folder contents as standing proxy for the social-order-in-and-of-clinical-activities. Actual folder contents stand to the socially ordered ways of clinic activities as *representations* of them; they do not describe the order, nor are they evidences of the order. It is the coder's use of folder documents as *sign-functions* to which I mean to be pointing in saying the coder must know the order of the clinic's activities that he is looking at in order to recognize the actual content as an appearance-of-the-order. Once the coder can 'see the system' in the content, it is possible for the coder to extend and to otherwise interpret the coding instructions to the actual contents, and in this way formulate the sense of actual content so that its meaning, even though it is

¹¹ Garfinkel gives a fuller description with examples of this phenomenon in Chapter Two of 'Studies in Ethnomethodology' (1967).

¹² It is worth noting that Garfinkel states that: "It is hardly news that on the way to a decision what a decision will have come to was reviewed and foretold in light of the anticipated consequences of a decision" (Garfinkel 1967:15). For example, that for a decision to be adequate for its practical purposes, those purposes and what an adequate decision must be capable of performing are part of the decision making process. This in many ways is the phenomenon that we will be explicating in the study of Legal Aid Tribunals.

transformed by the coding, is preserved in the coder's eyes as a real event in the clinic's actual activities." (ibid:23)

The documents are 'loose' descriptions, but they become adequate and sufficient when their user, in this case the coder, has the members knowledge for their practical use. In relation to this current study, the significance is that tribunal panel members, who themselves are practising solicitors and barristers, can be seen to *ad hoc* in a similar fashion. When presented with case documents, just like the coders in the above description, they do not interpret them with strict reference to the Legal Aid Handbook but rather, read them as competent members and so *ad hoc* the Legal Aid Handbook guidelines to make them relevant to the case contents and the 'system' they 'see' within them.¹³

The transformation through coding that Garfinkel notes has important repercussions as "the coded results consist of a persuasive version of the socially organised character of the clinic's operations, regardless of what the actual order is, and without the investigator having detected the actual order" (Ibid:23). In relation to legal aid tribunals any retrospective analysis of cases from looking at the case files, i.e. after the cases have been decided upon, is not going to retrieve the actual order of the case hearings. The conclusion that can be draw from this is that if research into the work of the decision making process of tribunals cannot adequately be achieved through the mechanisms of coding of case decisions from case files using the directives of the Legal Aid Handbook, we need another method.

Since we wish to investigate the actual, rather than documented, activities of legal aid tribunals we must look at the *ad hoc*, or 'contingent achievements', that constitute the 'adequate activities'. What we are looking to investigate is the 'common sense' world of members in, and through, their activities and expectancies. However, as Garfinkel points out, if we were to ask

¹³ Interestingly, during tribunal panel members' work of decision making, actual reference to the Handbook i.e. coding frame, is rare and used mainly at times of 'tension', disagreement, or uncertainty.

the member about these expectancies they would have little or nothing to say (ibid:37), largely because members are not consciously attending to them. To overcome this silence, Garfinkel, drawing on Alfred Schutz's concept of 'the attitude of daily life' and 'the world taken in common and for granted', developed a series of studies that attempted to detect some of these background expectancies. The significance of these was the finding that members have a background understanding of their everyday world which they expect 'others' to possess also.¹⁴ To uncover these expectancies Garfinkel then developed his 'famous' breaching experiments where 'scenic events' were modified so as to 'disappoint' the members' taken for granted common sense knowledge and competence.¹⁵

The significance of these experiments¹⁶ here (for the importance which Garfinkel attached to them at the time see Chapter Two of 'Studies in Ethnomethodology'), is that members have taken for granted background expectancies which they use in common with other members to interpret their

¹⁴ Garfinkel (1967a:53-54) notes: "Common sense knowledge of the facts of social life for the members of the society is institutionalized knowledge of the real world. Not only does common sense knowledge portray a real society for members, but in the manner of a self fulfilling prophecy the features of the real society are produced by persons' motivated compliance with the background expectancies....Seen from the person's point of view, his commitments to the motivated compliance consist of his grasp of and subscription to the "natural facts of life in society."

¹⁵ The basis of the breaching experiments lay in designing a situation in which a breach could be achieved, but where the situation could not be transformed into joke or play or the like. The member would not have sufficient time to redefine their real circumstances, and they would not have consensual support for the redefinition of the situation (Garfinkel 1967a:58). Garfinkel's experiments pick up some of the classic small group conformity research of social psychology (of Asch, etc.). What is novel is his attempt to explain *why* these findings arise and to show *how* people deal with them.

¹⁶ The breaching experiments did not, as Parson's theory would seem to predict, render situations senseless or meaningless for the subject. They revealed the 'moral' accountability of action i.e., that we are held accountable for our actions. They also illustrated the reflexive relationship between action and structure. (From a discussion with David Greatbatch)

world. Also, that when these are disrupted they will try and reconcile the versions, rather than act as judgemental dopes¹⁷ and accept their common sense knowledge as incorrect.¹⁸

The manner and effects of treating events as those performed by judgemental dopes are expanded upon by Garfinkel,¹⁹ and are a key aspect of his critique of classical social science.²⁰ One of the ways a member may be made out to be a judgemental dope is by over-looking the *et cetera* clause aspect of interaction. The *et cetera* clause is the notion that any 'agreement' between members is subject to unknown conditions in the future which lead that

¹⁷ The 'judgemental dope' notion comes from Garfinkel's critique of the methods of sociological (and psychological) investigations using 'cultural dopes' (and psychological dopes), especially Talcott Parson's model in 'The Social System' (1951) combining action theory and functionalism. Garfinkel states "By 'cultural dope' I refer to the man-in-the-sociologist's-society who produces the stable features of the society by acting in compliance with the pre-established and legitimate alternatives that the common culture provides" (Garfinkel 1967:68). The significance being that these models of human behaviour treat a member's common sense knowledge as an 'epiphenomenon', and ignore it in explanations of standardized expectancies and courses of action.

¹⁸ What is worth noting here is how many of the students actually went along with the experiment and accepted their position as incorrect. For what the experiments would seem to produce is 'cognitive dissonance', and one would expect the greater the dissonance the greater the effort to reduce it. As Festinger notes: "Another way of reducing dissonance between one's own opinion and the knowledge that someone else holds a different opinion is to make the other person, in some manner, not comparable to oneself. Such an allegation can take a number of forms" (L. Festinger 'A Theory of Cognitive Dissonance', quoted in Richard Milton, 1994:107-108). This did not appear to occur to any great extent though this may be explained as being due to the overwhelming evidence/pressure created by the research design for them to accept their incorrect interpretations.

¹⁹ For full details of this studies see Garfinkel's 'Studies in Ethnomethodology' (1967a:68-70).

²⁰ A good example of the real problems of treating members as cultural dopes is in the development of technology to assist in existing forms of work. Heath and Luff (forthcoming) report on this in the development of electronic record systems for General Practitioners and relate this back to Garfinkel's (1967a) observations on medical records.

agreement to be "retrospectively reread to find out in light of present practical circumstances what the agreement 'really' consisted of 'in the first place' and 'all along'" (ibid:p74).²¹ By 'agreement' what is meant is not some written contractual agreement, although it could encompass even these, but rather the agreed norms of behaviour and action in determinist theories of structural functionalism. I draw attention to this to counteract any notion that we should view any legal norms as wholly determinative of any of the interaction covered in this thesis. In fact Garfinkel notes that manipulation of the *et cetera* clause is well developed in certain professions, lawyers especially.²² These issues will be expanded upon later in the thesis in relation to legal positivism.

3.2a Documentary Method²³

Along with the indexical nature of interaction a central feature of Garfinkel's 'Studies in ethnomethodology' is the concept of documentary method which Garfinkel adopted from Karl Mannheim:²⁴

²¹ Garfinkel also notes that it is a mechanism by which disappointments etc. are managed, a sort of post-rationalisation process, though Garfinkel does not use that term.

²² This can be seen in Lynch and Bogen (1996:154-158) where Oliver North and his attorney gradually gain greater and greater freedom from the legal procedures of the Congressional Hearing throughout the hearing. Lynch and Bogen illustrate how this was achieved.

²³ It should be kept in mind when reading this section that Garfinkel (1996:18) notes: "The documentary method of interpretation is a convenient gloss for the work of local, retrospective-prospective, proactively evolving ordered phenomenal details of seriality, sequence, repetition, comparison, generality, and other structures. The gloss is convenient and somehow convincing. It is also very powerful in its coverage - too powerful. It gets everything in the world for practitioner/analysts. Its shortcomings are notorious: In any actual case it is indiscriminating and just in any actual case it is absurdly wrong."

²⁴ Mannheim (1956:53-63), 'On the Interpretation of Weltanschauung', in 'Essays on the Sociology of Knowledge'.

"The method consists of treating an actual appearance as 'the document of', as 'pointing to', as 'standing on behalf of' a presupposed underlying pattern. Not only is the underlying pattern derived from its individual documentary evidences, but the individual documentary evidences, in their turn, are interpreted on the basis of 'what is known' about the underlying pattern. Each is used to elaborate the other." (Garfinkel 1967a:78)

A key point here is that the documentary method does not locate propositions in a 'scientific corpus' of a static nature, but rather locates them in a common sense background assumption position dependent on prior and ongoing specification.²⁵ Garfinkel shows that such a description is essentially a depiction of the methodology which members themselves use. A example of this is 'Some Rules of Correct Decision Making that Jurors Respect' (ibid:104-115) where Garfinkel presents these methods as a series of normative rules derived from a series of observations focusing on Jurors decisions. Garfinkel notes that they are not substantially different from those they make in everyday activities, except, and importantly, that the juror is required to treat the decision making as a theoretical endeavour. Though this change is a significant one for the juror since normally straightforward aspects of daily life become equivocal when explained by the contending advocates, the versions of the advocates being incompatible with each other (ibid:110-111).²⁶ The result of this for Garfinkel, is that the juror adopts a position different from everyday decision making, in that, rather than think someone testifying is mistaken or lying, the juror takes the position that each seriously believes what they contend. However, rather than the juror becoming judicious or taking on an 'official

²⁵ Garfinkel stresses that this documentary method is used, though rarely recognised, by all sociological research no matter how positivist it may portray itself. Also, that in reading sociological accounts readers must employ the documentary method (see Garfinkel 1967a:96). In the same way the Legal Aid Appeals Committee must also employ the documentary method in interpreting their written materials.

²⁶ A contemporary example of this is provided by Goodwin (1994), where the question becomes was Rodney King beaten? Or were the police acting in a reasonable manner? Both accounts being argued for by respective advocates.

juror line', Garfinkel found that "jurors did not have an understanding of the conditions that defined a correct decision until the decision was made" (ibid:114). The significance of this is applied to everyday decision making then is that:

"... decision making in daily life would thereby have, as a critical feature, *the decision maker's task of justifying a course of action*. The rules of decision making in daily life, i.e., rules of decision making for more or less socially routinised and respected situations, may be much more preoccupied with the problem of assigning outcomes their legitimate history than with the question of deciding before the actual occasion of choice the conditions under which one, among a set of alternative possible courses of action will be elected." (ibid:114)

This justification aspect of decision making fits in well with the et cetera clause and redefinition of earlier actions due to the needs of present circumstances. At the same time it makes any model of linear decision making difficult to sustain: a key aspect of the empirical focus of this study.

The production of lists or normative rules is not to be taken, any more than breaching experiments are, as the necessary form of ethnomethodological description. In 'Passing and the Managed Achievement of Sex Status in an "Intersexed" Person Part 1', for example, Garfinkel uses a single case study of an individual - Agnes. The study was the result of approximately thirty-five hours of conversation with Agnes which were recorded, and his report is based upon these materials and materials of his collaborators Stoller and Rosen (ibid:121). This case study is presented in the form of a 'reported biography', some of the material being presented with reference to game playing,²⁷ and other material in terms of the inability of game playing,²⁸ as well as a critique

²⁷ That "basic rules are available for use by players and presumed by players to be available as required knowledge that players have prior to the occasions under which these rules might be consulted to decide among legal alternatives" (Garfinkel 1967a:141).

²⁸ "There are many occasions which fail to satisfy various game properties. When the game is used to analyse them, the analysis contains structural

of Goffman's role playing method of interpretation. Garfinkel proceeds by giving examples of situations that Agnes has reported herself as being placed in, and illustrating some of the 'passing' devices she used, though Garfinkel is keen to stress that 'passing' should be seen as an active mode, rather than in a static past tense. Garfinkel admits that there are some problems in adequately describing what Agnes' troubles were (ibid:167). Finally, it is worth stressing that the goal that Agnes was attempting to achieve was not clear and defined prior to the actions that had to be taken to achieve it, and in this sense we see the similarity between Agnes and the Jurors above.

A key study which Garfinkel reports with regards to this thesis is '"Good" organizational reasons for "bad" clinical records', a study in which the initial aim was to code the clinical record folder contents, though Garfinkel encountered so many 'bad records' that they became a phenomenon for the research. The 'troubles' that Garfinkel encountered were troubles that any social scientist will encounter "if he consults the files in order to answer questions that depart in theoretical or practical import from the organizationally relevant purposes and routines under the auspices of which the contents of the files are routinely assembled in the first place" (ibid:191).²⁹ Simply put, documents are tied to other routinised and valued practices than those the investigator is interested in.³⁰ Garfinkel notes that part of the problem of 'bad

incongruities" (Garfinkel 1967a:145).

²⁹ Another problem in using documents is that they be seen as only being one aspect of a larger process. The documents at legal aid tribunals, for example are produced in relation to the legal aid system as a whole, at least that run by the LAB area office. This is of course a critique we saw raised by Smith above.

³⁰ Garfinkel notes that this problem can not be overcome by the researcher insisting on self report form being completed in a particular fashion as this "runs the risk of imposing upon the actual events for the study a structure that is derived from the features of the reporting rather from the events themselves" (Garfinkel 1967a:195).

records' can be resolved if instead of being seen as 'actuarial' records³¹ they are seen as 'records of therapeutic contract'. Hence, when a record is attempted to be read as an actuarial record, and interpreted as such by a social scientist, it appears as a 'bad record'. Garfinkel likens folder contents to a conversation in their occasionality, in that:

"the remarks that make up these documents have overwhelmingly the characteristic that their sense cannot be decided by a reader without his necessarily knowing or assuming something about a typical biography and typical purposes of the user of the expressions, about typical circumstances under which such remarks are written, about a typical previous course of transactions between the writers and the patient, or about a typical relationship of actual or potential interaction between *the writers and the reader*. Thus the *folder contents much less than revealing an order of interaction, presuppose an understanding of that order for a correct reading*. The understanding of that order is not one, however, that strives for theoretical clarity, but is one that is appropriate to a reader's pragmatic interest in the order." (ibid:201)

Significantly, what the documents were talking about did not remain identical in meaning but changed depending on the occasions of their use. It is the present circumstances of their reading that decide their usage (ibid:201-202).³² The important conclusion of Garfinkel's for this current study is that:

"Which documents will be used, how they will be used, and what meanings their contents will assume, wait upon the particular occasions, purposes, interests, and questions that a particular member may use in addressing them." (ibid:203)³³

³¹ An actuarial record can be understood as similar to an account payment record book, a standardised account record.

³² "Hence, whatever their diversity, a folder's contents can be read without incongruity by a clinic member if, in much the same way as a lawyer 'makes a brief,' the clinic member 'makes a case' from the fragmented remains *in the course* of having to read into documents their relevance for each other as an account of legitimate clinic activity" (Garfinkel 1967a:203).

³³ A key point is that: "the competent reader is aware that it is not only that which the folder contains that stands in a relationship of mutually qualifying and

Documents cannot be seen as standing on behalf of something which is independent of their organizational uses. Such usage is not singular and neither are contents of the documents. It is possible to see how the use to which a folder can be put is not necessarily decidable in advance, but only once the use has been made.

Finally, Garfinkel's point, and it is beautifully simple, is that a social science that describes the actions of members in terms of a scientific rationality, a rationality that is not used in the 'everyday lifeworld' of members, is trying to use two incompatible systems, and consequently ironising common sense rationality (ibid:276). Hence, the troubles social science has in describing social action and rationality are "due not to the complexities of the subject matter, but to the insistence in conceiving actions in accordance with scientific conceits instead of looking to the actual rationalities that person's behaviours in fact exhibit in the course of their managing practical affairs" (ibid:277). As a conclusion to 'Studies in Ethnomethodology' Garfinkel states: "In a word, the rational properties of conduct may be removed by sociologists from the domain of philosophical commentary and given over to empirical research" (ibid:282).

3.2b Summary

We have looked at Garfinkel's 'Studies in Ethnomethodology' and this has given us some key focal points for this research methodology of this thesis. However this text was published thirty years ago and much has happened

determining reference, but parts that are not in it also belong to this too. These ineffable parts come to view in the light of known episodes, but then, in turn, the known episodes themselves are also, reciprocally, interpreted in the light of what one must reasonably assume to have gone on while the case progressed without having been made a matter of record" (Garfinkel 1967a:205). Absence is a reflexive aspect of documents.

since.³⁴

Garfinkel describes the research in 'Studies in Ethnomethodology' (1967a) as seeking "to treat practical activities, practical circumstances, and practical sociological reasoning as topics of empirical study, and by paying to the most commonplace activities of daily life the attention usually accorded extraordinary events, seek to learn about them as phenomena in their own right" (Ibid:1).³⁵ The focus, in other words, being upon practices taken for granted by individuals in society, practices of mundane profundity but which are the basis of all other 'higher' practices - including that of sociological understanding itself!³⁶

The activities that make up an 'action' or 'event' are exactly those 'things' which make the 'action' or 'event' evident and understandable, in other words for competent members (masters of natural language; participants) interpretation is possible without access to anything other than those actions and the activities which constitute them. Understanding can be achieved with recourse to only what is 'observable-and-reportable'. This should not be taken to mean that these activities have some form of static meaning which is readably

³⁴ The description below is essentially historical, see Garfinkel (1996) for his most current statement on his ethnomethodological position.

³⁵ The position of Garfinkel at this point was criticised as remaining within a positivistic framework: "Ethnomethodology seeks to 'rigorously describe' ordinary usage, and despite its significant transformation of standards for conceiving of and describing such usage, it still conducts its inquiries under the auspices of a concrete, positivistic operation of adequacy." (Blum and McHugh 1971:98-99) However, with the Wittgensteinian turn and the development of the 'studies of work' this critique would no longer be applicable.

³⁶ Peter Eglin (1975:386) states: "...scientific explanation and description has no 'logical' or in-principle superiority over commonsense explanation and description....More importantly, it is that commonsense work of interpretation, whether found in the practice of scientists or of other societal members, that is the proper object of sociological inquiry and explanation". This does not mean that in practice it is not attributed a superiority, but it is not this attribution that is the topic, rather actual practices.

'the same' on each occurrence, as we have noted above they are reflexive.³⁷

3.3 Developments in Ethnomethodology.

The stance towards social phenomena taken by Garfinkel is derived largely from the social philosophy of Alfred Schutz and the phenomenological philosophy of Edmund Husserl.³⁸ As Garfinkel notes:

"Husserl spoke of expressions whose sense cannot be decided by an auditor without his necessarily knowing or assuming something about the biography and the purposes of the user of the expression, the circumstances of the utterance, the previous course of the conversation, or the particular relationship of actual or potential interaction that exists between the expresser and the auditor." (1967a:4)

A fuller understanding of Garfinkel's ethnomethodology can be obtained if we see it in relation to the similar 'ethnomethodological' projects that developed alongside and from his initial work, the two most useful here being the cognitive sociology of Aaron V. Cicourel (1966) and the conversation

³⁷ Reflexivity. "In short, the relation between a given particular to be disambiguated and any particular in its disambiguating context is *reflexive*, for the given particular is part of the context needed to disambiguate the particulars in the context....Here, then, we cannot conceive of the whole as assembled out of pre-existing parts, nor the parts as determined by some pre-existing whole....Thus the concept of reflexivity holds that context and particular are mutually elaborative rather than being analytically independent terms. This relation of the reflexive mutual elaboration figures in the specific determination of meaning on a given occasion, and it is the simultaneous seeing of particular and context in their reflexive relation that constitutes the transparency of displays" (Wilson and Zimmerman 1979-80:59).

³⁸ A brief but general outline of the influence of Edmund Husserl and Alfred Schutz is located in Chapter 3, '*The Phenomenological Input*', in John Heritage (1984a). However, as Rogers (1984:166) notes "Those who look to phenomenology for insights into ethnomethodology, however, enter a blind alley. Ethnomethodology exhibits no consistent relationship to phenomenology." Lynch (1993) notes: "Garfinkel renounces any attempt to tag ethnomethodology to philosophical predecessors, although he has suggested a practice of 'ethnomethodologically misreading' the philosophers" (ibid:163ff).

analysis of Harvey Sacks, whom Douglas (1971:32) refers to a situational and linguistic ethnomethodologists respectively.

Garfinkel's ethnomethodology has been described as neither an objective or subjective perspective but rather 'relativistic' due to its rejection of 'implicit rules' as somehow providing invariant explanations of orderly activity (Peyrot 1982:278). It is this rejection of the 'implicit rules' or 'standard rule account' in interpretation, that came to be seen as a distinguishing factor (among others) between the work of Garfinkel and Cicourel, work which in both cases critiqued classical sociology.³⁹ While Garfinkel rejected the 'cultural dope' of sociological theories he rejected also need to investigate cognitive processes, unlike Cicourel whose interest in 'normal forms' focused on 'socially relevant cognitive properties' (O'Keefe 1980:201).⁴⁰

O'Keefe gives as the reason for this difference as Cicourel's retention of Schutz's⁴¹ focus on consciousness as a basis for the explanation of social phenomena,⁴² while Garfinkel denies interest in such inquiry and develops more

³⁹ Whatever may be said of his later work Cicourel's 'Method and Measurement in Sociology' (1964) is an excellent early critique of mainstream sociology methodology from an 'ethnomethodological' position. Though I agree that Cicourel's position is better regarded as 'proto-ethnomethodological' (Lynch 1993:11). For a discussion of Cicourel's 'Method and Measurement' see Lynch (1991:83).

⁴⁰ However, it seems to me that O'Keefe (1980) is not willing to come down completely on this point and qualifies his position by saying that they are not too far apart from each other: "So while not overlooking the important differences, we might still be able to say that Cicourel's and Garfinkel's work could be neatly melded" (ibid:214).

⁴¹ Michael Lynch (1991:84) notes the influence of Alfred Schutz in the early work of both Garfinkel and Cicourel: "The abstract themes under which Schutz elaborated the attitude of daily life, and the contrast he drew between the natural and human sciences - as well as between the presuppositions of the attitude of scientific theorising and those of the 'natural attitude' of daily life - were incorporated wholesale into Cicourel's and Garfinkel's proto-ethnomethodological early studies".

⁴² However, Cicourel takes phenomenological first person inquiry in a different direction from Schutz - toward the orientation of cognitive science.

in line with the Anglo-American philosophy of Gilbert Ryle and Ludwig Wittgenstein, both in the area of the philosophy of language (ibid:202).⁴³

Although the early work of Garfinkel was influenced by the work of Schutz, just as was Cicourel's, Garfinkelian ethnomethodology (and conversation analysis) developed a concern primarily with the phenomenon of social organisation as a system of activities, rather than as a set of interpersonal relations (Sharrock and Anderson 1987:293).⁴⁴

Conversation analysis is now probably the most widely known form of ethnomethodology, and illustrates well via comparison the direction and nature of Garfinkel's writings on ethnomethodology in 'Studies in Ethnomethodology'. There are occasions when conversation analysis and ethnomethodology are taken to be essentially the same (West and Zimmerman 1982:506), other commentators however have noticed misgivings within ethnomethodology to the 'constructive' and analytically 'distanced' analysis of conversation analysis where "a sequential/structural representation is studied from the position of

He does not retain the first person explicative stance of Husserl or Schutz. I am grateful to Michael Lynch for this observation in a personal communication.

⁴³ In contrast to Cicourel's 'Cognitive Sociology' (1973) which retained more of these tradition sociological concepts, Garfinkel's ethnomethodology and Conversation Analysis both, but especially the latter, went on to concentrate on language independent of such concepts as 'status' and 'role'. As Schegloff (1987:217-218) notes:

"All kinds of conversational, linguistic, so-called nonverbal, and other interactional behaviour have been related to such classical dimensions of social organization as class, race, ethnicity, and gender. Although one may choose to proceed along the lines of such a strategy in order to focus on important aspects of social structure in a traditional sociological sense, the risks of underspecification of the interactional phenomena should be made explicit, and with them the risks of missing the opportunity to transform our traditional understanding of what is important in social structure. Although the trade-off may be made in order to benefit important sociological or sociopolitical concerns, even these concerns may suffer if the interactional phenomena are not completely explored on a technical basis."

⁴⁴ Cognitive issues are part of Garfinkelian ethnomethodological studies only to the extent that they become researchable as situationally constructed phenomena (see Jeff Coulter 1989).

'anybody'" (ten Have 1990:41).⁴⁵

Without going into the history of Sacks's intellectual development⁴⁶ the move to the 'sequential/structural' aspect of conversation is tied into Sacks' belief in "the possibility of a stable social-scientific account of human behaviour of a non-reductionist sort"⁴⁷ an argument which provided a grounding based on the existence of science, unlike anti-positivist and anti-scientific basis of Garfinkel's work (Schegloff 1992:xxxi-xxxii). The importance of this shift by Sacks, as we shall see below, is that it moves from taking the analyst's understandings as the initial point of departure, to taking that of the co-participants.

3.3a Conversation Analysis.

While ordinary conversational interaction between interactants can be problematic, is not always, or even ordinarily so. The assumption made by conversation analysis is that the reason for this is that the descriptive and organisational practices are 'on show' to the interactants, are readable by them, and for that reason, are investigatable (Lee 1987:30). It is the design principles of these organizational practices that concern conversation analysis (Wootton

⁴⁵ Lynch (1993:191) notes that the divergence of conversation analysis and ethnomethodology can be located as being after Garfinkel and Sacks' (1970) paper 'On the Formal Structures of Practical Action'.

⁴⁶ Sacks died prematurely in a road accident in 1975, for many years the vast bulk of Sacks' work, notably his lectures, were not widely available. These were eventually published in two volumes (Harvey Sacks 1992), the introduction to this work, by Emmanuel Schegloff contains a substantial overview to both Sacks and his work.

⁴⁷ Schegloff (1992:xxxi-xxxii) states: "Sacks concluded, from the fact of the existence of natural science there is evidence that it is possible to have (1) accounts of courses of human action, (2) which are not neurophysiological, biological, etc., (3) which are reproducible and hence scientifically adequate, (4) the latter two features amounting to the finding that they may be stable, and (5) a way (perhaps the way) to have such stable accounts of human behaviour is by producing accounts of the methods and procedures for producing it."

1989:239).

The design of conversation is seen to be built into its utterances and the context that sequences of utterances form over time, where the interactants constantly document their understanding of the conversation in and through the orderliness of the conversation itself.⁴⁸ The conversational 'machinery' thus allows the achievement of intersubjectivity by members (Lee 1989:38), and the discovery and evidencing of orderliness within interaction by analysts (Wootton 1989:243-244), the discovery of the observable technologies of conversation, rather than uncovering the hidden meanings of interactants (ten Have 1990:37).

As a basic summary we can agree with Heritage (1989) that:

"The basic orientations of conversation analytic studies may be summarised in terms of four fundamental assumptions: (1) interaction is structurally organised; (2) contributions to interaction are both context shaped and context renewing; (3) these two properties inhere in the details of interaction so that no order of detail in conversational interaction can be dismissed a priori as disorderly, accidental or interactionally irrelevant; and (4) the study of social interaction in its details is best approached through the analysis of naturally occurring data." (ibid:22)

Central to CA's analysis is the principle of conditional relevance, with 'turn-taking' and 'adjacency pairs' often considered to be independent phenomena working within the conditional relevance. Adjacency pairs display public understanding, for CA, by the addressee or second speaker of the prior talk. As Heritage (1989) states:

"Thus second pair parts not only accomplish (or fail to accomplish) some

⁴⁸ Sometimes the conversation is depicted not so much as being driven by the participants, but driving them, as an independent 'self'. This view of conversation by C.A. as a "self-explicating system" is criticised as a threat to the social character of C.A.'s phenomena (Sharrock and Anderson 1987:313). The problems of approaches that attempt rule governed approaches to conversation have been outlined by Wieder (1971) and would seem applicable to such a development, if it were taken up by C.A..

relevant next action, they also display some form of public understanding of the prior utterance to which they are directed." (ibid:25)

The evidence for this is seen to be in terms of recipient design with examples such as next speaker selection and orderly turn-taking,⁴⁹ a 'simplest systematics' (Sacks, Schegloff and Jefferson 1974), in which "respective actions interlock to produce that normatively required state" (Lee 1987:42). Achieved through continuous "monitoring and analysing of utterances, with each utterance analysed for its consequences for any given next utterance" (ibid:44). Since such displays are public conversation they can proceed without need for speculation, thus avoiding inquiry into cognitive processes as in Cicourel above, focusing instead on the "..conversational practices for achieving and exhibiting understanding" (Sharrock and Anderson 1987:312).

Conversation analysts do make occasional references to mental states, of a vernacular sort, to what speakers and participants know, think, 'have in mind' etc. Although this is done supposedly only to be able to make reference to the mechanics of conversation, it seems hard to reconcile this with the C.A. methodology as it is the mechanics of turn-taking which are supposed to produce the 'context' of conversation. There is neither space nor real need here to critique C.A.'s methodology.⁵⁰ Rather, what I wish to draw attention to is C.A.'s notion of being scientific, a notion Garfinkel rejects.

3.3b Ethnomethodological Studies of Work

⁴⁹ West and Zimmerman (1982:523) note: "For example, if a current speaker selects a next speaker by employing an initial event - or 'first-pair part' - say, a greeting, this procedure also selects the next action by that speaker, namely, a greeting in return. The selected speaker, in seeing that a greeting has been issued and then offering a greeting in return, will not only satisfy constraint engineered by the initiation of the sequence in the first instance, but also thereby display to the first speaker, to others present, and potentially to an analyst *how* the initial remark was understood."

⁵⁰ For a critique of conversation analysis see 'Molecular Sociology' Chapter Six in Lynch (1993), see also Lynch and Bogen (1994, 1996).

It was noted above ethnomethodology has no unified position, and we have noted the directions that Cicourel's cognitive sociology and the conversation analysis directions took from the early Garfinkelian position. Lynch (1993), without wishing to split ethnomethodology into traditions, believes that current work in conversation analysis is going in a different direction than ethnomethodology (and early ethnomethodology and conversation analysis),⁵¹ but that there is not an irrevocable split. The aim in this chapter is not so much to give a genealogy of ethnomethodology, as to lay open to view the key aspects as I see them, to make this current study comprehensible. In so doing it now becomes necessary to leap forward to the current 'state of the art' in 'Garfinkelian ethnomethodology', and attempt some clarification.⁵²

Garfinkel believes that the corpus of work that forms the 'studies of work' offers "evidence for locally produced, naturally accountable phenomena of order*, logic, reason, meaning, method, and so on, in and as the unavoidable and irremediable haecceity of immortal, ordinary society" (Garfinkel and Wieder 1992:175). My aim here is to first of all explain this sentence.⁵³

⁵¹ The case has been made by Michael Lynch and David Bogen (1994) that Conversation Analysis has developed in a way contrary to the direction that it would have followed if had kept to Sacks' notion of a 'primitive natural science'. They also note (1996:274) that "conversation analysis (as this off-shoot is called) has developed independently of Garfinkel's initiatives."

⁵² Garfinkel's current writings on ethnomethodology, as was 'Studies in Ethnomethodology' (1967), are not very 'accessible' to the average reader. They, due to a language attempting exactitude, are dense and demanding. The arguments contained are complex and sophisticated, and what is written below is just skimming the surface of the ethnomethodological project as he sees it. This thesis is an empirical study with strong ethnomethodological 'overtones', it is not an exploration of ethnomethodology thought and practice.

⁵³ It will be useful to start with an explanation of the use of the asterisk on the term 'order*'. This derives from the use of ordinary vernacular terms in ethnomethodological description, but vernacular terms which are used tendentiously. This is explained in the following terms: "In speaking tendentiously, a term is written with its asterisked spelling, for example, detail*. In that spelling, we use detail* knowing that by detail* is meant something other than and different from what the reader would explain or *can*

Sociology and ethnomethodology are both concerned with the investigation of order, or in ethnomethodology's case, order*. However, in ethnomethodology's case, order* is seen to be a locally produced and accountable phenomenon, in contrast to formal or classical sociology's 'order' which is seen as extra-local rather than local.

When looking at order* ethnomethodological focus has been upon 'haecceity'.⁵⁴ Haecceity is understood here as the:

"just thisness: just here, just now, just what is at hand, with just who is here, in just the time that the gang of us have, in and just what the local gang of us can make of just the time we need, and therein, in, about, as, and over the course of the in vivo work, achieving and exhibiting everything that those great achievements of comparability, universality, transcendancy of results, indifference of methods to local parties who are using them, and for what they consisted of, looked like, the 'missing what' of formal analytic studies of practical action." (ibid footnote:203)

Now we can see that the concern of ethnomethodology is with locally produced and naturally accountably order* which has a 'just thisness' which produces a society containing occurrences which appear stable but are made of, or constituted by, a multitude of 'just thisnesses'. What Garfinkel and Wieder claim is that ethnomethodology has offered evidence of this.

The evidence is from ethnomethodological studies of work, which have

explain with any of the detail's many vernacular 'straightforward' meanings, thus at the same time knowing that detail* is used as a corrective on the readers understanding" (Garfinkel and Wieder 1992 footnote:205). So if we return back to 'order*', we see that "order* be read as a proxy for any topic of reason, logic, meaning proof, uniformity, generalization, universal, comparability, clarity, consistency, coherence, objectivity, objective knowledge, observation, detail, structure, and the rest" (ibid footnote:203). The asterisked vernacular term is used instead of inventing words to describe new phenomena, or more exacting usage of existing terms.

⁵⁴ Haecceity as a term replaced the earlier use of the term quiddity which is used as a more exact meaning of detail, or rather detail*. However, the term quiddity had a familiar connotation of essence and since ethnomethodology is not concerned with essences, haecceity was adopted instead as it does not refer to any essence.

described or demonstrated topics of order*, or rather phenomena of order*, as being respecifiable as consisting of, or possessing, "two incommensurable, asymmetrical alternate technologies in and as of the particular phenomenon's production, observability, recognition, accountability, demonstrability, and so on" (ibid:175-176). These two, or rather paired, technologies being; those of formal analysis and ethnomethodological description. Their relationship being the "unavoidable, irremediable details of the particular phenomenon of order*" (ibid:176).

These two technologies are evident when both formal analysis and ethnomethodology move from the topic of order* to the respecification of a phenomenon of order*, both disciplines requiring certain, but differing, emphasis be included in their respective technologies for that respecification of the phenomena of order. The central issues for both technologies of respecification (i.e. 'classical' and 'ethnomethodological') are the issues of descriptive precision and probity (that an issue can be settled). However, whereas ethnomethodology emphasises the "production and accountability of order in and as ordinary activities" (ibid:178), formal analysis uses one or other of its many forms of 'transcendental' analysis. In terms of probativeness, ethnomethodology is concerned with issues restricted to those in the phenomenon of order* itself, whereas formal analysis is concerned with the issues of how transcendental issues such as equality, justice, power etc. affect members, ethnomethodology is indifferent, displays indifference, to any such concern with 'transcendental' issues unless they are phenomena to be investigated in situated activity. So ethnomethodology is interested in the details of order* displayed within activities rather than through the imposition of some external conception of order.

This difference is so fundamental that any attempt at reconciliation is considered 'pointless'. To clarify this further it will be worth contrasting ethnomethodological and formal analytic methods.

3.3c Ethnomethodology Contra Variable Analysis.

In this thesis the ethnomethodological orientation to research is placed in the context of sociological research in general.⁵⁵ This has already been achieved to an extent above in this discussion of ethnomethodological studies of work, and the discussion of Garfinkel and Wieder's (1992) 'Two Incommensurable Asymmetrical Technologies of Social Analysis'. But the task can be completed with reference to Douglas Benson and John Hughes' (1991), 'Method: evidence and inference - evidence and inference for ethnomethodology.' This text puts the case for ethnomethodological research in a clear emphatic manner, doing so with recourse to a contrast to variable analysis as the standard by which sociological research is measured.

The contrast with classical sociology that ethnomethodology, as alternative way of investigating phenomena, provides, is both significant and not easily over-emphasized. As such it warrants some space here.⁵⁶ The most prevalent form of research method in classical sociological studies has been

⁵⁵ It is generally regarded that due to the phenomena it investigates that ethnomethodology, while distinctive, is located within the sociological enterprise. This is the case, for instance, with Wilson and Zimmerman (1979-80:53) who note that ethnomethodology has "antecedents within the larger sociological tradition notably in the works of Weber and Marx". Though they do believe there is a tension between ethnomethodology and conventional sociology, and this lies in ethnomethodology's conception and use of 'reflexivity' (ibid). It is reported that "Garfinkel's view is that the failure to scrutinise the nature of sociological phenomena themselves is at the root of the problem and explains the continued production of equivocal results [by conventional sociology]" (Lee 1987:22).

However, the relationship between ethnomethodology has recently been described by Lynch (1993:38) in the following terms: "In a sense, ethnomethodology is a parasite on the host discipline of sociology, but unlike a parasite that reduces its host to a lifeless husk, ethnomethodology tries to invigorate the lifeless renderings produced by formal analysis by describing the 'life' from which they originate."

⁵⁶ Lynch and Bogen (1997) provide an interesting contrast between classical sociology and ethnomethodology in terms of developments in the sociology of scientific knowledge.

variable analysis,⁵⁷ and has become a standard of adequacy for judging other approaches, even the participant observation tradition has been overshadowed by dominance of the systematic investigation by methods of variable analysis (Benson and Hughes 1991:109).

Methodological debate within sociology is usually discussed, and taught, in terms of qualitative versus quantitative methods. At times in sociology's short history this has occasionally taken the form of opposition between two camps, much to the detriment of the debate.⁵⁸ The result being for Benson and Hughes, that little was achieved in "trying to deal with the problem of securing adequate empirical reference" (ibid:110). Much of the problem is seen to lie with the attempts of sociology to copy the methods of the natural sciences, an issue that seemingly just will not die, largely due to the practical successes of the natural sciences. Also, perhaps, encouraged by the growth of sociology and its professional associations with funding institutes in the post World War Two period. One area of concern due to the emulation of the natural sciences has been the attempt to apply mathematical reasoning to human phenomena.

This focus on the mathematical is problematic for a number of reasons,⁵⁹ but what is of import here is that the mathematically based methods require the aggregation of phenomena, rather than remaining with individual instances, and as such require the homologizing of the social and the mathematical. This takes the form of the mathematisation of social phenomena, transforming the social world into a mathematically rule governed object. A necessary aspect of this process is the classification of social phenomena into units of equivalence. In this classification, equivalency rules are employed that ignore the fact that "that members of society also deploy 'rules' for the determination of equivalency

⁵⁷ The term variable analysis was originally employed by Hubert Blumer (1956), 'Sociological Analysis and the "Variable"', *American Sociological Review*, Vol 19:683-690.

⁵⁸ For an outline of this debate see Alan Bryman (1992) 'Quantity and Quality in Social Research', London, Routledge.

⁵⁹ See Benson and Hughes (1991:112-117) for a full description.

within their contexts of action" (ibid:119). Hence, even if the mathematical procedures do allow the use of classification rules deployed by members, their mathematical abstraction results in our knowing "little about the properties of the underlying phenomena; only how it looks through the imposition of the format" (ibid:121). This is a key aspect of the ethnomethodological critique of 'formal analysis',⁶⁰ and important to this thesis in that formal analysis is prevalent in socio-legal research.

The ethnomethodological critique of formal analysis is that it obscures the categories that the members of society themselves have, and significantly, they conceal "the way in which members use the categories they do in order to make the social world visible and organisable in ways relevant to them" (ibid:124). Formal analysis imposes upon phenomena a grid of sociological descriptive practices irrespective of the displayed properties of that phenomena (ibid:125). This criticism is fundamental.⁶¹

Instead of the aggregation of individual phenomena, ethnomethodology

⁶⁰ Garfinkel (1996) in 'Ethnomethodology's Programme' sounds almost conciliatory when he states: "Formal Analytic (FA) technology and its results are understood worldwide. Almost unanimously for the armies of social analysts, in endlessly analytic arts and sciences of practical action, formal analytic procedures assure good work and are accorded the status of good work. FA's achievements are well known and pointless to dispute" (ibidp5). But adds that, "Ethnomethodology (EM) is proposing and working out 'What More' there is to the unquestionable corpus status of formal analytic investigations than formal analysis does, ever did, or can provide" (ibid:6).

⁶¹ "The claim is, first, that there is a *bona fide* and unresolved problem for sociological inquiry which is that of the organisation of everyday affairs as such, and second, that this problem cannot be examined from within, or by simple modification of, the established framework of investigation" (Sharrock and Anderson 1987:295). And in relation to the criticisms of ethnomethodology by formal analysis: "Thus, the kind of criticism to which this alternative proposal is subjected are prevailing to the effect that it will not explain this issue or be able to account for that one, criticisms issued on the assumption that the proposal outlines and envisages a comprehensive scheme for the treatment of all the problems which might conceivably fall within the domain of sociology....What a strategy might achieve is really only something to be tested out in practice by applying it and seeing how far it will go." (ibid 1987:296)

looks at singular occurrences of individual instances and the mechanisms by which they are achieved. By mechanisms, it is meant that singular instances of 'actual occurrences' are "the products of a 'machinery' that constitutes members' cultural competence" (ibid:130). Though by reference to mechanisms it should not be presumed that this entails a mechanistic and essentialist view of human action, as noted in the explication of haecceity above, such a position is untenable. Ethnomethodology uses singular instances, the number of instances being immaterial to the proof of a description. This does not mean that observations are not taken to be applicable to other occasions as:

"The 'mechanism' is an orientated to feature of the culture to produce *that* action, and it is this which provides for the trans-situational character of an ethnomethodological description. In making visible the methods by which persons assign sense to their environment, one has secured a characterisation of what methods are utilised by persons in everyday life to produce its orderliness in all its fine detail." (ibid:131)

So at this point a 'mechanism' would seem to be depicted as something that will occur on another occasion, but this is not necessarily the case as:

"Once the 'machinery' is described, any more instances do not provide any more evidence for the description. What more instances do is provide yet another example of the method in action, rather than securing the warrantability of the description of the machinery itself. Given this attention to naturally-occurring instances, there is no sense in trying to specify a collection of data in advance, as required say, by sampling procedures, since prior to investigation it cannot be known what an instance is a sample of." (ibid:131)

But machinery is too rigid a term with connotations of repetitively similar actions in industrialisation, perhaps a better metaphor as to what members methods consist of is 'skilled practices' such as those belonging to pre-industrial artisans where no object produced was an exact replica of another. This then, I suggest, this makes the concept of uniqueness stable in the multiple deployments of members methods. The confusion which I perceive possible in the above quotations, results from talking about ethnomethodology

with the terminology of formal analysis, and its attachment to scientific principles of replication, and is possibly a good reason for ethnomethodology to fully abandon such formal analysis discourse. This is especially so, I think, if the language in which a discourse is to be carried out is, due to its hegemony in the social sciences, always going to end up using terminology which is incommensurable with the ideas of ethnomethodology. Fittingly we shall move from a contrast of ethnomethodological and formal analysis methods and focus on those of the former.

3.3d Ethnomethodological methods.

To a large extent we have defined ethnomethodology by what it is not, rather than what it is, although historically this is how ethnomethodology has gone about its self-description. In many ways this is because ethnomethodology has no prescribed methods, instead there are 'guideline to objectives'.

"..the ethnomethodological objective is to generate formal descriptions of social actions which preserve and display the features of the machinery that produce them. This requirement of 'unique adequacy' stipulates the aim of describing in detail members' competence in producing everyday action." (Benson and Hughes 1991:131)

This statement does two things: it gives ethnomethodology's aim and it notifies us of a stipulation for ethnomethodological practice. What it does not do is define ethnomethodological methods. The reason for this will become clear if we recall that ethnomethodology is the description of the methods members use to produce phenomena of order*. A "phenomenon of order* is available in the *lived* in-courseness of its local production and natural accountability" (Garfinkel and Wieder 1992:182). The result of this that: "The technical, distinctive job of EM, the craft of EM, consist of in vivo tasks of discovering phenomena of order* as instructible achievements in and as their coherent details. EM's results are identical with radical phenomena of order*" (ibid181). This does not outline a method but informs us what

ethnomethodological descriptions should be doing; revealing the methods of the phenomenon of order*. These are intimately tied to the phenomenon itself, and cannot be specified in advance of any phenomenon of order* they seek to describe.⁶² All that can be said in advance is that the methods consist of descriptions. Instead of looking at the issue of methods of description,⁶³ it may be more useful at this point to look at the requirements of method.

One requirement of methods by ethnomethodology is that of unique adequacy. The unique adequacy requirement⁶⁴ has two aspects, these are referred to by Garfinkel and Wieder (1992:182) as; the weak use, and the strong use. The weak use is the requirement that "the analyst must be *vulgarly* competent in the local production and reflexively natural accountability of the phenomenon of order* he is 'studying'....that the analyst be, with others, in a concerted competence of methods with which to recognize, identify, follow, display, and describe phenomena of order* in local productions of coherent detail" (ibid). So the ethnomethodologist should have the member's competencies to be able to recognise and describe the phenomenon of order* they are investigating. The strong sense should be familiar to us now in that it means: "*Just in any actual case* a phenomenon of order* already possesses

⁶² A question may remain as to how this adequacy is to be assessed.

⁶³ In 'Studies in Ethnomethodology' (1967a) we saw Garfinkel deploy various descriptive practices, some of which would now be seen as problematic e.g. breaching experiments.

⁶⁴ The 'unique adequacy' of methods is where the concern is to:

"..operate *from within* the competence systems they describe. Accordingly, their descriptions of orderly and socially organized inquiries do not present an opposition between the practices described and the practices which make such description possible. Instead, the studies recognize the prevalence of *inquiry* as the phenomenon they confront in their entry into the scenes of work's accomplishment. In presenting accounts of these competencies ethnomethodologists variously seek to exhibit those socially located inquiries in such a way as to bring the "reader" *into* the common setting of practical conduct. Such demonstrations entail more than a stipulation of rules of conduct, or of theoretically informed interpretations of the social actions in the particular settings studied" (Lynch and Woolgar 1988:6).

whatever as methods could be of [finding it] if [methods for finding it] are at issue" (ibid) (brackets and italics in original). It is sometimes assumed that the issue of unique adequacy implies some sort of 'black box' of activities, that are somehow so unique to an activity that their understanding is only accessible via full membership of the profession or group that undertakes such activity. This is not actually the case as to do so would be to propose, for example in science, "a picture of each science as a bounded epistemic container with well-defined zones of 'inside' and 'outside'" (Lynch 1983:278). Using Wittgenstein's discussion of "family resemblances" in language games as an analogy, Lynch argues that such isolationist view of practices are misunderstandings of Garfinkel. To a large extent this explains why the focus of ethnomethodological interest has moved to 'epistemic' themes, instead of any attempt at describing isolated practices in specialised activity and only understandable to members of that specialism, activity, profession etc..

Another requirement of methods is the use of 'perspicuous settings'. This relates to ethnomethodological methods being embedded in the culture producing the phenomenon of order*, since it is only in such settings that the "material disclosures of the practices of local production and natural accountability in technical details *with which to find, examine, elucidate, learn of, show, and teach the organizational object as an in vivo work site.*" (Garfinkel and Wieder 1992:184) become available. Such settings teach the analyst about work practices of the members. It is not the case that the analyst is already proficient in the methods of these members already and hence cannot be taught them, to do so would be to erroneously fall back on the view of methods as transcendental, but it is also not the case that the analyst is not without some knowledge as to what these practices consist of or their experiences as a member of the general culture which supports such activities.

Along with indifference, which has been discussed above, unique adequacy and perspicuous settings can be seen as the main requirements of ethnomethodological studies in the studies of work programme of Garfinkel and others. Recent developments in the 'studies of work programme', have

described ethnomethodology as being post-analytic, and we shall look at these.

3.4 Post-Analytic Ethnomethodology and its Application in this Thesis.

Though this work is given a separate section this is more for the simplicity of description as Lynch's work can be seen as a continuum of Garfinkel's original studies and/or part of the Garfinkel led 'studies of work' (discussed above). Initially we will briefly look at Lynch's view of the study of science and how this can be related to our interest in legal positivism and legal practice. We will then look at Lynch's view of post-analytic ethnomethodology, and how that has been interpreted and adapted for use in this thesis.

3.4a Science.

Lynch's interest in science is an ethnomethodological one in which the very positivity of science becomes a topic, and where positivist techniques such as become topics of order to be respecified (1991:79). Such a respecification is not the rejection of positivism as such, and certainly not of its techniques of practice, instead these are things which are considered with indifference and the concern is with how these are a phenomena of social order. The concern with positivism is with how this is itself and organised practice of a discipline through the articulation of the rules and methods of 'science'. However, ethnomethodological studies of positivism in science invariably investigate the 'ordinary' "practical and contextual production of measurable phenomena"(ibid:82-83). Any Schutzian contrast between scientific theorising and the 'natural attitude' of daily life are now rejected from ethnomethodological studies:

"The conventional distinction between scientific and common-sense measurements - which holds that the former are precise, disinterested, and correct to the extent permitted by the state of the art, while the latter are approximate, interested, and often erroneous - is no longer of any use

to ethnomethodology." (ibid:97)

There concern instead is with how locally organised practises of science become acceptably 'true' definitions of the positivist scientific project.

However, it is through this abandoning of the scientific/common-sense divide that we come the application of the ethnomethodological studies of science's applicability to the investigation of legal positivism. if we look at Lynch's (1988a) discussion of Schutz's distinction between science and common-sense when Lynch posits counter-proposals to the five proposals on the relationship between science and everyday knowledge attributed to Schutz. Lynch states in relation to his counter-proposals that while they:

"call into question the entire *picture* of science as a 'principled' or 'rational' activity. This does not imply that scientists are 'unprincipled' or 'irrational', but that *any* set of general epistemological or methodological rules for scientific activity stands in a problematic relation to the phenomenon." (ibid:81)

It is this same attitude which I am suggesting can be applied to the positivism of law, just as it has been successfully applied to the positivism of science. The result is not to suggest that legal practice and practitioners are 'unprincipled' or 'irrational', but to suggest that the positivist explanation and understanding of legal practice needs to be respecified. This is not to suggest that all rule-like expressions in legal positivism are necessarily 'wrong' but to suggest that they are necessarily incomplete due to the situated nature of their actual 'use'. As Lynch states:

"The theoretic import of the critique of the rule is that rules are not *descriptions* of actions, but take on their relevance and adequacy as *accounts* of actions in a dependent relation to the 'work' that is done to establish their relevance while adapting to the contingencies of a particular situation." (ibid:84)

Just as Lynch states that common-sense can not be seen to be independent of developments in science (ibid:85), the same may likely be true

in relation to legal positivism in the common-sense of legal practitioners. What we expect is that there some symbiosis, but even more likely that such a description is a gloss for the activities themselves.

3.4b Post-Analytic Ethnomethodology.

Lynch's most complete articulation of post-analytic ethnomethodology is argued in the 'Scientific Practice and Ordinary Action' (1993), although we will initially look to the explication given by Lynch and Bogen (1996) in the methodological appendix to 'The Spectacle of History: Speech, Text, and Memory at the Iran-Contra-Hearings'.

Sociological readers, they note, expect a normative stance and reference to existent theories in the presentation of data, this makes ethnomethodological adherence to indifference⁶⁵ in its studies appear as nothing more than 'mere-description'. This derogative association is attended to by Lynch and Bogen by reaffirming that ethnomethodology's task is to, investigate intelligible actions performed on singular occasions looking at the resources used by members on such occasions, in terms of their dialogical production. Indifference does not mean that interpretation⁶⁶ is denied, but that adherence to a pre-determined theoretical position is. They state:

"The difference, on the one hand, is between starting out by isolating and defining the structures and elements of meaning, and, on the other, beginning in the midst of the action and describing how speakers in an ongoing exchange commit themselves to doing (and meaning) something through what they say. Although both starting points, in principle, can get at the intertwining of linguistic forms and situated usage, they lead to very different understandings of the role of formal structures in communicative actions." (ibid:267)

⁶⁵ For a more exacting definition of 'ethnomethodological indifference' see Garfinkel and Sacks (1970), also Lynch (1993:141-147).

⁶⁶ The idea of description without interpretation is recognised as 'problematic'.

Lynch and Bogen, in a move heavily influenced by Wittgenstein, locate themselves as starting in the midst of action, focusing on the local discursive methods in a descriptive fashion away from any craving for generality. They do not deny large powerful social structures, but instead of endowing them with some 'transcendental' status, believe they are to be "investigated in the local-historical situation of their production" (ibid:272), and respecified. Lynch and Bogen stress how this is a manifestly different direction from that being adopted currently by conversation analysis, developments which they have critiqued elsewhere⁶⁷ as having normative and foundational tendencies.⁶⁸ They state that ethnomethodology is post-analytical when it describes how "the sources of intelligible action and defensible judgement are not contained within even the most elaborate system of prescriptions and specifications" (ibid:287).

The objective of the 'studies of work' programme and post-analytic ethnomethodology can be described as an attempt to study the 'missing what', that virtually all sociological studies 'miss'. The just 'what' of the interaction that constitutes the work of the occupations studied (Garfinkel and Wieder 1992, Lynch 1993:271). Initially Garfinkel insisted that an adequate mastery of the occupation to be studied was necessary for any ethnomethodological descriptions, hence there was a strong requirement for participant observation in the early ethnomethodological 'studies of work'. This 'unique-adequacy requirement of methods' required that the researcher master the practices to be studied (Lynch 1993:273). While these studies searched for the quiddity of interaction in an occupation, it should not be thought that each occupation has

⁶⁷ See also Lynch (1993) 'Scientific Practice and Ordinary Action' Chapter 6, and Lynch and Bogen (1994) 'Harvey Sacks's Primitive Natural Science'. Lynch, in a personal communiqué, has stressed that he is not making a sweeping rejection of the conversation analytic programme.

⁶⁸ While the epistemological positions adopted by practitioners of conversation analysis are not all alike, an example of the type of stance that Lynch and Bogen would seem to have in mind is provided by Drew and Heritage (1992) in their introduction to 'Talk at Work'.

a fundamental essence that can be sought and described (ibid:278). Rather than an essence the search, for Lynch, becomes one of locating particular 'epistopics', recurrent themes that are associated with the classic conceptions of truth and knowledge, and to "explain how a general epistemic theme is part of a local complex of activities" (ibid:281). Lynch explains the use of epistopics as the following:

"I use the neologism *epistopic* to suggest that the topical headings provided by vernacular terms like *observation* and *representation* reveal little about the various epistemic activities that can be associated with those names. The epistopics are classical epistemological themes, in name only. Once named as - or locally identified as a competent case of - observing, measuring or representing, an activity and its material traces can be shown to be governed by a set of rules, a body of knowledge, a method, or a set of normative standards associated with the particular theme. But once we assume that nominal coherence guarantees nothing about localized praxis, we can begin to examine how an activity comes to identify itself as an observation, a measurement, or whatever without assuming from the outset that the local achievement of such activities can be described under a rule or definition" (Ibid:281-282).

Epistopics, rather than being "metaphysical unities" are glosses for recurrent themes in the description of the local production of work (Ibid:282). An investigation of the epistopics of work therefore does not stop at the level of the epistopic or gloss, but investigates how that epistopic in its vernacular usage is uniquely adequate to its use in practice. This is relevant to the issue of legal positivism as we can investigate the theoretical conception that law has of itself by looking at the localised practises that it actually deploys in its practical activities. This is not to say that the theoretical terms are not in some way deployed in practice, but that if they are they will have specifically localised uses. Lynch's investigation of scientific practices is relevant to legal positivism since legal positivism, as will be described in Chapter Five has attempted to adopt the 'logic' of science as a justification of legal rule. Just in another era, and currently in other cultures, it has used the dominant paradigms of the day such as religion.

This respecification of the epistopic (Ibid:283), requires investigating singular occasions of conduct for their orderliness. Unlike mainstream social science where single occasions are deemed problematic, they are here seen as intuitively recognizable and vernacularly describable phenomenon, that this is so being that if this was not the case "how participants manage spontaneously to produce mutually coordinated activities would be a complete mystery" (Ibid:285-286).⁶⁹

Lynch's 'Scientific Practice and Ordinary Action' (1993) culminates in the outlining of "a 'programme' of investigation that combines ethnomethodology's treatment of ordinary practical actions with the sociology of scientific knowledge's interest in the 'contents' of scientific practices" (ibid:299). The research aim of the 'programme' is the investigation of scientific and practical reasoning epistopics, discursive themes such as: observation, description, replication, measurement, rationality, representation, and explanation (Lynch 1993:299). Although these may seem to be the topics of epistemology they are nevertheless also vernacular categories, categories of order*. This 'programme' has been adopted and adapted in this thesis to the investigation of legal practice. I believe this to be unproblematic in that Lynch does not indicate that the 'programme' is solely for the investigation of scientific phenomena, and doubly so since practices of natural science are inseparable from the everyday practices of the life-world (ibid:297, 300). What I wish to do below is set out the programme as Lynch describes it, then, following this, describe how these have been interpreted in their implementation for this research. The programme suggests that:

1. "Begin by taking up one or more of the epistopics." This involves searching for "perspicuous settings" in which the epistopic has "a prominent vernacular role" (ibid:300).
2. "Search for primitive examples" (Ibid:300). Following Wittgenstein,

⁶⁹ Lynch notes that this necessitates the rejection of the idea of a presuppositionless enquiry, the researcher always finds the research phenomena to a greater or lesser degree intelligible (Lynch 1993:286).

rather than Garfinkel, Lynch suggests that there is no requirement of a thorough mastery of the practices to be investigated ethnomethodologically (ibid:301).

3. "Follow the epistemics around and investigate actual practices in detail. An ethnomethodological transformation of Wittgenstein's approach would be to search for "naturally occurring" primitive language games and to investigate their performance in detail" (Ibid:301). However, while "No single case stands for all others, but the 'conceptual binding' among the cases supplied by the epistemic lends general significance to the investigation" (Ibid:302). Each investigation says something about the epistemic.

4. "Investigate each case in accordance with the unique adequacy requirement" (Ibid:302). This will greatly influence the presentation of the material to the reader, Lynch states: "For epistemics like observation, measurement, and explanation, the task is thus to construct exercises in which readers are led to conduct observations, measurements, and explanations - or, at the very least, to follow along vicariously as the accomplishments of others are elaborated in detail - so that they are able to examine the various performances" (Ibid:302-303).

5. "Apply ethnomethodological indifference to the fact of the existence of science" (Ibid:303). The translation of this into an ethnomethodological study of legal practice would be that, the research must suspend treating the practices of lawyers as being 'epistemologically special'. Though this does not deny the training needed to become a lawyer, nor however, does it mean that legal practice should not be a 'special topic' for sociology. Rather, it is to see that legal decision making involves practices that can be seen as constituting rational decision making. This can be clarified by Lynch, who states in relation to observation in physics. "Although there is no reason to privilege the way that physicists conduct their observations, their practices can inform, in an interesting way, the heterogeneous practices that are identified under the concept of observation. This would not foreclose studies of various other modes of observation in and out of the sciences; in fact, one would want those cases also" (Lynch 1993:304).

6. "Use a 'normal science' methodology" (Lynch 1993:304). Lynch attributes his use of the notion of 'normal science' not to Kuhn's use of the term, but rather to Chomsky where it "in this sense uses ordinary modes of observing, describing, comparing, reading, and questioning, and its constituent activities are expressed in vernacular terms... This normal science offers an analysis that is thoroughly 'contaminated' by native intuition, vernacular categories, and commonsense judgements" (Ibid:304-305).⁷⁰ To achieve this the description of epistemics must "both enable the practical reproduction of an intuitively recognizable action and provide a notational index of the transparent details of that action's performance. Both of these transparencies are collapsed into a single textual object, but when enacted over the course of a reading they become distinctively 'instructive' temporal moments" (Ibid:305).

7. "Relate the 'findings' back to the classical literatures" (Lynch 1993:305).⁷¹ Rather than an engagement in epistemology as such, he suggests that this type of investigations may instead *displace* the framework of epistemology.

These have been adopted and adapted to this research along the following lines:

1. This research was begun with the aim of investigating document use and the related talk in administrative tribunals. A perspicuous setting was found in legal aid tribunal, so the research was instigated with an aim that was not initially informed by the investigation of an epistemic. However, although the

⁷⁰ This appeal to 'normal science' is not an appeal to commonsense, but rather an attitude of indifference to the epistemological statuses associated with social science methodologies (Lynch 1993:305).

⁷¹ A point Lynch footnotes here, and worth restating is: "This is the final point in the programme that I have outlined here, but it is not necessarily the end of the game. What I have proposed is a way to get started from within the confines of an academic field. A more 'advanced course' in ethnomethodology would pay more attention to the possibilities of developing 'hybrid' disciplines from out of the praxiological exchange between ethnomethodological research and the practices studied.." (Lynch 1993 ff:305-306) A discussion of this though is well beyond our present concerns.

research setting and data collection were not informed by the notion of epistemics, because they were chosen with a view to an ethnomethodologically orientated piece of research they have afforded the possibility of building this into the research. The manner in which this has been done is, to take as an epistemic the issue of legal positivism. This is a liberal interpretation of what Lynch means by 'epistemic' in that residing mainly in legal literature it does not have such a general usage as the vernacular term 'representation' for example. Nevertheless, since the vernacular 'representation' is, when investigated in the setting of laboratory practice, a term of order* within the context of scientific practice and hence the science 'community's' vernacular, this lack as an everyday term in 'ordinary conversation' by 'legal positivism' is not so problematic. Further, since the investigation of, again for example 'representation', does not rely upon the use of the term itself, but the activities which are seen as constituting it by members, that legal practitioners may not overtly pronounce an activity as an instance of 'legal positivism' may not be as problematic as it initially appears. Though the choice of legal positivism as an epistemic does originate from an initial interest at the outset of this research into the possibility of using the ethnomethodological approach, so successful in respecifying aspects of practice relating to positivist science, applied to legal practice. This is something that the post-analytic ethnomethodological approach, in the exploratory fashion that imbues this whole thesis, in particular could facilitate. Although the investigation of an epistemic has had to be situated within the context of the original aims of this research to investigate document use in administrative tribunals, fortunately the two have not been too incompatible.

2. Lynch's second 'tenet' has also not be applied from the start in that the choice of the legal aid tribunal as a setting was achieved before the issue of epistemics entered the research. However, even if retrospectively, the choice of legal aid tribunals can be seen as providing 'primitive examples' of legal positivism and legal representation. Although the High Court might be regarded as the epitome of legal practice, the selection of tribunals for research would

possibly have occurred anyway for reasons of accessibility. Firstly in that the High Courts are not available to ethnomethodological research needing audio tapes as their use is illegal. Secondly, in relation to the issue of 'unique adequacy'. In that, although not being a trained lawyer before initiating the research is, as Lynch drawing on Wittgenstein has noted, not problematic as such. The choice of a research site which is not too 'formalised' involving the use of highly specialised practises makes the description of the situated activities less problematic. Problematic in the sense of simplifying specialised activities to an audience not experienced in those specialised activities.

With regards the selection of which data to present to the reader, this choice has been on the basis of which case can, in the limited space available, illustrate the concerns of the thesis. Not all of the data refers to a particular epistopic as the data has also been required to display the tribunal process as a whole, and the use of documentation within that. This again does not fit in with Lynch's programme for a post-analytic description of epistopics, unless one was to claim to be taking 'tribunal' as an epistopic. This is not the case here, although it also would be worthy of such research.

3. As noted above, the investigation of the epistopics and description in detail of actual practices has been tempered by the aim to provide some form of description of the whole of the phenomena of the legal aid tribunal. Further, the descriptions of practices are shaped by the description in detail of the textual practices, an aim that constituted the original focus of the research. However, these are not incompatible and are used elucidate the epistopic of legal positivism in Chapter Five as well as the use of texts in Chapter Six.

In describing the processes of tribunals as a whole, a number of individual cases have been described, and as the ethnomethodological position is that each instance of a phenomenon is unique it may be thought that nothing could legitimately be said about the phenomena of legal aid tribunals. That even to attempt to do so within an ethnomethodological 'framework' could be methodologically flawed. However, while the unique cases described here are not claimed as representative of tribunals as a whole. However, by modifying

Lynch's concept of 'conceptual binding' rather than a 'general significance' being present in relation to the stated epistemic alone, I have worked on the basis that this is applicable to more than just the stated epistemic. The basis of this is that, any particular sequence of situated activity does *not* have only one researchable epistemic within it, especially so when we are dealing with extended transcripts i.e. large pieces of data. Rather, it is merely the case that the research has highlighted one specific epistemic for investigation. Therefore if a 'general description', even if inevitably affected by the concerns of the researcher, is presented of phenomena which are understood to be instances of another phenomenon e.g. tribunal, readers will notice the conceptual binding of other possible epistemics that have not been explicitly drawn to their notice. So whereas the description of cases has focused on the textual and representational aspects of the data, the generalised nature of the description provides the possibility for the reader see conceptual bindings of other potential epistemics.

In this thesis, although all the instances of the situated activity are unique, the reader may spot the conceptual bindings that make all these as instance of the potentially explorable epistemic 'tribunal', 'legal aid tribunal', 'attended tribunal', 'bureaucratic encounter' and more. These are not explicitly stated here or formulated as epistemics, but they are nonetheless potentially there for the reader. Thus more is conveyed than just a number of accounts of unique phenomenon in relation to an epistemic or research 'themes'. The problem is not in these connections being made by the reader in their reading practices, but of a researcher making such 'connections' explicit in terms of some abstract theorization instead of the ethnomethodological description of epistemics.

Thus I believe there is some legitimacy in saying that a number of unique instances will provide some sort of larger picture of legal aid tribunals, but that the researcher can not unproblematically make claims about what this is, as the frontispiece quote from Wittgenstein notes, the difficulty is to stop. That this is at all possible, I suggest, depends on the nature of the presentation

of the data. If provided with extracts from cases alone, I suggest that such a display of the 'tribunal' would not be possible. Hence not only are full transcripts of the data provided in Appendix Three, which I recommend are read after this chapter and before engaging in the rest of the thesis, descriptions of the data follow each transcript. Of course, some sort of analysis is unavoidable here, as we shall see below, but I have attempted to restrict this as much as feasibly possible. The use of a basic conversation analytic type data transcription system, rather than some other transcription system, was adopted not only due to my, and my anticipated readers familiarity with it, but because I believe it does not detract from this provision

4. This research has been supported by the ESRC and to gain this funding the research has had to have build-in policy objectives, although due legal aid tribunals being largely previously uninvestigated phenomena rather than being dominated by policy issues the thesis has been more explorative. As noted above the desire to describe the whole process of the legal aid tribunal and focus on documentation remained central throughout. The presentation of material in line with Lynch's programme has proven to be a difficult task, not only due to the design of the research and collection of the data occurring prior to the general adoption of Lynch's programme,⁷² but also because of the large space such descriptions consume, as is evidence in their presentation in Appendix Three. Further to this, Lynch's position is a sophisticated one and as Ph.D student undertaking their first ethnomethodological piece of research, understanding, never mind adhering to Lynch's programme, resting as it does for its sense on the whole ethnomethodological cannon, is challenging enough. The fact that Lynch (ibid footnote p302) reports Garfinkel as noting that only four studies have satisfied the 'unique adequacy' requirement as applied to the presentation of data, displays the difficulty of the process.

In an attempt to satisfy the programme's requirements for the

⁷² This Ph.D was in fact initiated in the same year that Lynch's (1993) study was published.

presentation of data this thesis has adopted the 'thick description' of extended data, although as noted above this has been presented differently from anything Geertz (1973) may have had in mind. The aim has been to describe the various performances in some detail while also elaborating upon aspects of interest. In doing so the aim is to try and allow the reader to enter the phenomenal field of the member's practices. However, this is difficult using description alone, without the resources and subject matter that a post-analytic research project might be designed around e.g. the practical articulation of a prism. Nevertheless within the limitations of the use of transcripts the data has been rendered into description that I believe does allow reader to examine the members' performances. Although it has only been possible two cases in this fashion in the main body of the text, the other cases being presented in Appendix Three.

5. This research, especially due the requirements of the funding body and initial research design has not attained ethnomethodological indifference in its narrowest sense. However, with regards adoption of indifference to the fact of the existence of legal positivism, the research has suspended treating the practices of lawyers as being 'epistemologically special'. Though this is not to deny the training needed to become a lawyer, or that legal practice should not be a 'special topic' for sociology.

6. Lynch's tenet about the use of a 'normal science' methodology ties in with the above observations made above in 'four', the use of 'normal science' being tied in with data presentation and description. The description of the data in this thesis has tried to use vernacular descriptions of the activities rather than the technical language of sociology or law. Where technical language is used by the members in their activities attempts have been made to clarify these for a non-specialist reader. What to an extent has proven to be difficult has been providing only descriptions that are "thoroughly 'contaminated' by native intuition, vernacular categories, and commonsense judgements" as Lynch prescribes (Ibid:304-305). The slip from native intuition, vernacular categories, and commonsense judgements of the activities into those of a practising

sociologist within the ethnomethodological tradition is one that has to be constantly watched out for. An example of this has been the temptation, not completely avoided, to making observations on the data that are informed by studies in conversation analysis, but which have become part of my 'intuition' and 'commonsense' as a sociologist. To combat this throughout the data description I have concerned myself with critiquing conversation analytic practices, this has to an extent enabled me to be aware of some of the assumptions derived from conversation analysis that I have imported into the descriptions. Since these critiques are not central to this thesis they have not been presented in it, but the influence of this perspective on my descriptions remains evident.

The inevitability, or not, of analysis in description has been one of the central methodological concerns in the provision of the data description (see the following section). Although the length of descriptions has ultimately led to them being contained in a separate appendix rather than in the main body of the thesis. Briefly, I believe no description avoids the influence of the researcher's perspective, all that the researcher can do is to be reflexively aware of this 'problem' and attempt to keep it to a minimum, certainly no claims are made as to total absence of such influence in this thesis. What has been produced here for the reader are descriptions of the intuitively recognizable actions displayed in the data, with selective detailing of those actions relating to the epistemic and 'themes' that have been set out as the interests of the research. The textual object which is produced by this is one in which the individual phenomenon become represented through a re-presentation which constitutes, among other things, a doctoral thesis, this is an issue which has been reflexively present throughout. Nevertheless, it is hoped that the production of this text has also allowed each described phenomenon to display the details of its performance and as such be instructive for the reader. A conscious effort has been made to allow the description to perform this detailing and instruction without a reliance on previous studies on the described activities. The difficulty here has been in avoiding the learnt academic practice of continually displaying

ones background reading and 'learning' to the reader. This, although attempts have been made especially in Chapter Four and Appendix Three to avoid it, manifests itself in a study such as this in copious referencing of 'relevant' literature, and can result in a tendency claim more than is warranted by the data.

7. The final tenet of Lynch's programme relates to how the epistemic of the research is developed. In this I have related legal positivism to 'classical literature' in light of the 'findings' of this research. This has been presented in a single chapter and separate from the descriptions of the phenomena in Chapter Four and Appendix Three, so that the discussion will not affect the data description via the introduction of theoretical issues. Chapter Six is a discussion of 'themes' relating to texts and representations, but these themes are not developed into, or intended as, epistemic investigations. Instead this is an investigation of textual practice which is necessary for facilitating members' use of any epistemic theme, e.g. representation'.

3.4 Summary.

In the above description of ethnomethodology above we noted that this is only one possible 'version' as ethnomethodology has no one unified position, although Garfinkel's (1967) 'Studies in Ethnomethodology' it is generally accepted as a defining moment in its genesis. Central to the ethnomethodological 'project' was the rationality of an account is not independent of that account, instead its rationality is constituted in and of that account. This implies a uniqueness initially to be understood in terms of the indexical nature of words and expressions. This uniqueness of actions and events is not to be seen as a problematic situation since members who overcome this temporal indexicality by treating it as a practically situated issue resolvable from the observable rational character of action by and for each member. It is these methods of displaying and recognising the meaning and logic of actions that are the phenomena of ethnomethodology.

Having looked at some of Garfinkel's 'studies' we concluded that research into the work of the decision making process of tribunals cannot adequately be achieved through some 'sociological' technique such as the coding of case decisions from case files using the directives of the Legal Aid Handbook, since what we need to investigate are the members 'common sense' activities and expectancies and that to achieve this we need another method. However, while we looked at various studies by Garfinkel what became evident was that ethnomethodology does not, as such, has a prescribed set of techniques that can be just adopted to undertake a study, that although Garfinkel produces lists and normative rules, uses breaching experiments and interview cases studies, none of these can necessarily be adopted as a definitive form of ethnomethodological description and methodology. It has been suggested that there is no set of predefined methods as such, instead the ethnomethodological position, simply put, is that the activities that make up an 'action' or 'event' are exactly those 'things' which make that 'action' or 'event' evident and understandable. That since for competent members understanding is possible without access to anything other than those actions and the activities which constitute them, studies should make recourse only to only what is 'observable-and-reportable' about phenomenon. In terms of this position in contrast to 'formal' of sociology, while both 'formal' sociology and ethnomethodology are both concerned with the investigation of order, or in ethnomethodology's case, order*. For ethnomethodology order* is seen to be a locally produced and accountable phenomenon, in contrast to formal sociology's 'order' which is seen as extra-local rather than local. While ethnomethodology emphasises and describes the local production and accountability of order in and as ordinary activities, formal analysis uses one or other of its many forms of 'transcendental' analysis. Although ethnomethodology provides a critique of formal analysis in that it obscures the categories that the members of society themselves have and conceals members' 'accounting' practices, this has not been our main concern here.

While we are not able to define any ethnomethodological methods in the

form of predefined research techniques in the 'classical' sense, it has been suggested that we can say what ethnomethodological descriptions should be doing and that that is, revealing the methods of the phenomenon of order*. However, these methods, or 'ethno-methods', are intimately tied to the phenomenon itself, and cannot be specified in advance of any phenomenon of order* they seek to describe. We have suggested that all that can be said in advance is that the methods consist of descriptions. Therefore instead of looking at the issue of methods of description, we looked what were 'the requirements of method'. Although again it was suggested that this was not definitive or final, we noted among these requirements, the use of 'perspicuous settings', unique adequacy and indifference.

Focusing on the work of Michael Lynch and post-analytic ethnomethodology we noted ethnomethodology's interest in science, one in which the very positivity of science becomes a topic, and where positivist techniques as such become topics of order to be respecified. The objective of post-analytic ethnomethodology and the 'studies of work' programme of which it can be seen to be a part of, being the attempt to study the 'missing what', that virtually all sociological studies 'miss'. It was suggested that such an approach would seem applicable to our interest in legal practice and that this 'form' of ethnomethodology' should be adopted and adapted to this current study. To this end Lynch's 'programme' was outlined and a description of how it has been adopted and adapted for this study provided. However, no assumption is made by myself, nor by Lynch and Bogen I believe, that this as yet constitutes a fully worked out methodological 'programme'. As such it should be clear that the methodology of this thesis is not that of some off-the-shelf programme for doing social research, though at times I have envied those who choose such an option, instead it is an exploratory, not fully worked-out, evolving, and situationally deployed research perspective. It is this which makes it both demanding and rewarding.

In the following chapter we shall look at some descriptions of Legal Case Tribunal cases and the data which constitute the representations of those

phenomenon, where there will also be an initial discussion of what we may understand by 'post-analytic description.

Chapter Four - Four Phases of Legal Aid Tribunals (and Critique).

'A rule stands there like a sign-post. Does the sign-post leave no doubt open about the way I have to go? Does it shew which direction I am to take when I have passed it; whether along the road or the footpath or cross-country? But where is it said which way I am to follow it; whether the direction of its finger or (e.g.) in the opposite one?-And if there were, not a single sign-post, but a chain of adjacent ones or of chalk marks on the ground-is there only *one* way of interpreting them?-So I can say, the sign-post does after all leave no room for doubt. Or rather it sometimes leaves room for doubt and sometimes not. And now this is no longer a philosophical proposition, but an empirical one.'

Ludwig Wittgenstein *Philosophical Investigations* (1958:No. 85)

"Given a future, any future, that is known in a definite way, the alternative paths to actualize the future state as a set of stepwise operations upon some beginning present state are characteristically sketchy, incoherent, and unelaborated. Again it is necessary to stress the difference between an inventory of available procedures - investigators can talk about these quite definitely and clearly - and the deliberately programmed stepwise procedures, a set of pre-decided 'what-to-do-in-case-of' strategies for the manipulation of a succession of actual present states of affairs *in their course*. In actual practices such a programme is characteristically an unelaborated one."

Garfinkel 'Studies in Ethnomethodology' (1967a:97-98)

This chapter is an introduction to the work of the tribunals, which rather than an overview in which a descriptive gloss the tribunals is produced, here the reader is initially presented with two unique cases which I believe can produce a similar, and I suggest better effect. Better because this use of two 'perspicuous instances', of an unattended and attended case respectively, allows the reader a chance to 'enter into' the phenomenal field of the tribunal action. The aim being for the reader to gain a ready comprehension of Legal Aid tribunals without forming a standard version independent of actual cases, at least not to the extent an overview produces. Although it is admitted that any such introduction necessarily directs our understanding of the phenomena, all that can be hope is to minimise the negative aspects of the 'glossing' involved in this.

The two cases which are described in the second section are preceded by a section which discusses the description practices adopted for the description of the two cases and the description of all the cases contained in Appendix Three. This section is concerned with explaining the applied methodology as developed from the methodological discussion of the previous chapter.

In the second section following the description of the two cases it is suggested that the second case provides for an understanding of the processing of the attended tribunal as consisting of the adoption of a four 'phase' process by the panel members. It is suggested that this not purely a theoretical imposition on the data but can actually be seen to be one attended to by the participants itself. This 'four phases' is then used as a descriptive term when discussing other cases, notably in the full descriptions provided in Appendix Three. However, as is illustrated in the fourth section of this chapter this use of phases is meant only as a 'loose description' when applied to other cases and is not meant to have any foundational connotations, although this is an of step to take it is one that should be exercised with all due anti-foundational caution.

Section Three then uses extracts from other cases to display activities that can occur in Legal Aid tribunals but which are not practices that occurred in either of the two perspicuous cases described in Section Two. It is intended that the presentation of these segments of data, even though they are removed from the context of the other ongoing activities in which they occurred (these of course are provided for the reader in Appendix Three), they do provided a fuller depiction of Legal Aid Tribunals without the 'glossing' activities of a theoretical abstraction.

In the fourth section of this chapter we will look at three cases which display the problems of adopting a four phase model as an over-arching version of the activities of an attended Legal Aid Tribunal. These cases display the members of these tribunals as subverting the 'normal' four phases 'model' described previously for the situated needs of their activities in progress. This section displays the inherent dangers in adopting an over-arching model of the

a process independent of the unique occasions of its occurrence.

Finally in Section four we shall look at the use rule-following as a descriptive version of phenomenal events in terms of previous ethnomethodological research in this area, principally that of Zimmerman (1971). Then, with reference to the two options that initially face an appellant those of either a non-attended or attended tribunal, it is suggested here that what distinguishes them, apart from the fact that one has the presence of an appellant and the other does not, is the difference between presentation based only on a written text, and those that have a oral dimension. A description of this distinction will be provided in terms of Lynch's (1982) discussion of monologic and dialogic talk. It is suggest that the use of such descriptive categories can be a useful to for understanding phenomena but that they should not be taken as foundational or supersede the actualities of situated activity.

4.1 The Presentation of the Data Descriptions.

As has been noted in the previous chapter one of the requirements of ethnomethodological studies is that they brings the reader in to a close understanding, an almost 'seeing', of the activities that are at work. This is usually achieved by the description of singular instances, however throughout this thesis we are afforded the possibility of looking at multiple rather than singular occurrences¹, although each is described in terms of its singular

¹ The use of singular cases is not perceived as problematic in ethnomethodology, as it is so often perceived in classical sociology. Single cases are unique but also formally composed and methodical. As Sacks (1984:21) states, their "description consists of the description of sets of formal procedures persons employ" (quoted in Maynard and Manzo 1993:177). As Maynard and Manzo (1993:177) observe "of course no analysis of a social event, such as the deliberation, can involve all its elements, but with an appropriately limited investigative scope, it can render some class of phenomena that emerge and bear a relationship to other aspects of the event". However, the Sacks quote must also be seen in the context of Sacks' statement on the same page as the above quote, that "sociology can be a natural observational science" (Sacks 1984:21), see Lynch and Bogen (1994) for a

occurrence. The individual cases are seen as individual projects which, just like the projects in laboratory science, appear 'bounded' with definite beginnings and endings. Though, just as projects in a laboratory setting can be linked to each other in a variety of ways, so can the cases in a tribunal session.² Whilst such a presentation of cases does not compromise ethnomethodology's methodological requirements, it is acknowledged that two or three cases any more than one from a series of Legal Aid Appeals tribunals, does not provide a complete picture, nor is that being claimed here. Rather, it is the more modest claim that two or three instances may be more informative than one when presented in the fashion adopted here. That detailed descriptions of more than one instance allow the reader to intuitively make comparisons, comparisons which I suggest are not 'scientific', and as such any comparative analysis thus provided for by the text is developed without making any foundational claims. This is the case even when in the final discussion of the chapter the notion of monological and dialogical decision making is discussed, it is intended that in this fashion text goes some way to providing a post-analytic description and reading.³

The description of a number of unique phenomena may be thought to inevitably lead to an ironicization of their uniqueness due to viewing them

critique of this and how it has been developed in conversation analysis.

² Each individual case is heard by the tribunal individually, but also as one of a number they will be engaged in during a session, due to cases being granted individually and not as a session this aspect cannot be investigated further here. For comments on the nature of projects in laboratory science, see Michael Lynch (1985), especially Chapter Three.

³ Due to the limitations it is mainly in the second section of this chapter and in Appendix Three that the attempt a post-analytic descriptions are fully pursued. In a sense what is produced is a rendering, a transformation of a living process for examination. However, whereas in certain biological processes such data collection and display necessitates the killing of the subject, and hence the next phase is that of a new subject, here it is due to practicalities of description and limitations of space. Although the desire to provide more than one case is a factor too.

collectively, this is undoubtedly a valid point. Nevertheless, the aim in this research is to avoid this as much as possible by maintaining the focus on the individual cases at hand. The research remit from the ESRC does have implications which inevitably lead to some discussion of aspects of the larger phenomena of Legal Aid Appeals Tribunals and it is not being pretended otherwise. However, attempts to avoid some of the gross ironicizations of classical sociology have been made by saying less rather than more in the data descriptions.

The use of extended transcripts in Section Two and Appendix Three is a consequence of the desire to convey to the reader, within practical limits, the details of the individual phenomena in the most complete fashion possible. Reference has already been made to the limitations of a narrative punctuated with the 'odd' example from the data, and the aim here has been to provide the reader with as much of the data and its description as possible.⁴ The reason for this is the attempted post-analytic description without the assistance of some practical apparatus for bring the reader into the phenomenal field. I believe that the next best way of doing this here has been to provision of extended transcripts. The use of extended transcripts is not without problems of course, for instance the number of instances of unique phenomenon is severely curtailed, and the amount of detail into which discussion can enter is also limited - at least for a balanced description. This, however, would only be problematic if the descriptions of the phenomena were intended to go into as much detail, and for the same analytic reasons, as say conversation analysis enters. Fortunately, the aim here is not to do conversation analysis of extended transcripts, but do a different form of ethnomethodology. Nevertheless, it is anticipated that the transcripts contain much that could interest conversation

⁴ Perakyla (1997:204) notes that audio recordings may "entail a loss of some aspects of social interaction, including (a) medium- and long-span temporal processes, (b) ambulatory events and (c) impact of texts and other 'non-conversational' modalities of action." Although video analysis would have proven informative with regards some of these, (a) and (c) are attended to in some way by the use of extended transcripts and the focus on texts respectively.

analysis. Indeed I have been aware of this through the production of this thesis, though at the end of the day I have had to be aware that this was not the aim of the thesis.

One of the aims of the use of the extended transcript has been to view activities as they occur and develop temporally, and to be able to view these activities within the context of other ongoing activities. Much empirical research using recorded transcripts has a tendency to display the data in a 'cut and paste' style, where often minimal contextualisation is provided and the segment presented as if 'self-explanatory' or context free. Of course the presentation of data depends greatly on the type of analysis and the restrictions of space. Nevertheless, a result of the use of data segments is that it places the reader as being to a large extent dependent on the interpretation provided by the author,⁵ and consequent loss of the ability to develop their own interpretation. There is the danger of ironicization when displaying the data in such a fashion due to the use of a 'generalising' description to provide the context. In this thesis while full transcripts and the description of each 'case' discussed are not practical to provide, every attempt has been made to provide as much as possible. While only two cases are described in this fashion in the main body of the text, others are provided in Appendix Three. Since an aim of this research is to provide a description of the phenomenon of Legal Aid Appeals Tribunals, I believe such use of data and description can only enhance the readers' understanding of those phenomena. Of course it is not being pretended that the descriptions provided in this thesis are somehow without perspective, but they are indifferent in the terms described earlier.

The data presented in the second section of this chapter is in the form of a series transcription segments, unsegmented transcription being located in Appendix Three, these are each followed by a general description of what is occurring. Further, discussion is then made, after a case summary following the

⁵ One way of formulating my aim here is to see it as corresponding to Lynch's (1988) attempt at allowing readers to access the adequacy of what he is saying by allowing them some independence in viewing the data.

final case segment description, on certain issues which arise that are worth closer attention, the criteria of which are that they are pertinent to the concerns of this thesis. The text which accompanies the transcripts is not meant to be an analysis as such, although it by definition includes some degree of this, but a description of the activities of the member's work in a Legal Aid Appeals Tribunal. Reference to specific activities will be drawn to the reader's attention, but it is not being suggested that these are the only points of interest, as extended transcripts can provide for a number of epistemics and related themes. While some references are made to research by others which reflects on the 'activities' of the members in their interaction, these are minimal in an attempt not to lose contact with the phenomenon being described.

The separation of data, description, and discussion adopted here may seem unusual since they are often inter-twined, the reason for this is so that the reader can move through the descriptions of the cases without constantly distracted from the activities that are being described. Such distraction, usually in the form of a particular theme and usually at some distance from the data itself, I believe, overly affects the reading that the reader has of the data. This may make the contentions of the author more plausible but do so by ironicizing the data, even if it looks like the discussion is 'data driven'. The description of the activities recorded in the data are there to 'bring' the reader 'into' the setting of the tribunal and the practical activities that are taking place. I suggest that when these descriptions are overlaid with discussion of various overarching themes, the effect is to bring the reader out of the setting into an abstract reading of the activities.⁶ Of course outside of Section Two and Appendix Three it has not been possible to avoid the use of data segments, although full transcripts are provided for the reader elsewhere.

The transcription method used here is a simplified version of that

⁶ Of course the author is always directing the reader in some fashion, for example with the use of headings (see Harweg 1980). The aim is not some naïve attempt to eliminate the role of the author in the presentation, but rather to minimise that role.

designed by Gail Jefferson and the reader is directed to Appendix Two for a description of this and the abbreviations employed in this thesis. The precise details of performances has not been entered into in the descriptions as it is felt that the level of description engaged in here is sufficient for the aims of this thesis. The aim is to go through the actions that occur and due to the amount of data and number and variety of actions performed, the descriptions do not enter into 'every detail'. Where great detail is undertaken this is selectively achieved. This may seem unsatisfactory, but the reason for providing the extended transcripts is not only provide a description, but also to provide context for the reader of any particular focus.

Finally, in Section Two the use of 'headings' for each individual segments described and presented before the reader reads the transcript, it is recognised inevitably directs the reader. These headings must therefore be recognised as somewhat ironising the data, since they provide an abstract notion of what is to occur before it is presented. This is an unfortunate bowing to convention on my part, and the reader is encourage to take these headings not as rigid definitions but as a 'loose' description. Certainly the title of a segment does not reflect all the activities that can be found to be occurring in the data. This can in some degree be mitigated if, as recommended, the reader refers to the full transcripts in the appendix before looking at the data descriptions presented here. Preferably the reader would have access to the audio tapes also, but for both practical and confidentiality reasons this is not possible.

4.2 Two 'Perspicuous' Cases of Legal Aid Tribunals.

When an applicant for legal aid is refused assistance by the area Legal Aid Board, they are given the opportunity to seek a second opinion, should they care to do so, in the form of an appeal to a legal aid appeals tribunal. Should they decide to do so they will have they opportunity to either, (a) send in the appropriate documentation and have the tribunal make a decision in their absence or, (b) send in the appropriate documentation and attend in person at

the tribunal. We can see this as being could see this as a choice between the presentation of purely written text based documentation on the subject of the decision making, or verbally based documentation of the subject.⁷ This is however a little too simplistic⁸ in that attended appeals also have written textual presentation present. So the dichotomy can therefore be seen as one of either (a) written text only or (b) verbal and written text.⁹ Of course any verbal presentation may be recorded and transformed into a written text for later usage, this is due to what I believe to be the priority of the written documentary

⁷ It is interesting to note the difference between literate cultures' with law enshrined in the written text, and primary oral society where the law "is enshrined in formulaic sayings, proverbs, which are not mere jurisprudential decorations, but themselves constitute the law. A judge in an oral culture is often called on to articulate sets of relevant proverbs out of which he can produce equitable decisions in the cases under formal litigation before him" (Ong 1982:35).

⁸ There is a split within the work upon communication which usually divides interaction into written or spoken e.g. "Written discourse develops more elaborate and fixed grammar than oral discourse does because to provide meaning it is more dependent simply upon linguistic structure, since it lacks the normal full existential contexts which surround oral discourse and helps determine meaning in oral discourse somewhat independently of grammar" (Ong 1982:38). However, in this work I try not to have an either/or view but one which looks at a simultaneous existence of both in the single phenomenon.

⁹ It is worth clarifying the use of the term 'text'. Ong (1982) in his discussion of 'primary oral' or pre-literate society notes: "In concert with the terms 'oral literature' and 'preliterate', we hear mention also of the 'text' of an oral utterance. 'Text', from a root meaning 'to weave', is, in absolute terms, more compatible etymologically with oral utterance than is 'literature', which refers to letters etymologically/ (*litterae*) of the alphabet....But in fact, when literates today use the term 'text' to refer to oral performance, they are thinking of it by analogy with writing" (ibid:13) As this thesis attempts to show, in certain situations oral texts are 'intertwined' with written texts in certain instances of communicative interaction. Ong believes that in literate cultures such as ours there does not exist a clear dichotomy between orality and writing since the form of orality that exists in our culture is not primary orality i.e. orality unaffected by writing forms, rather we have a secondary orality i.e. an orality that has incorporated forms derived from the essentially abstract written word. Ong argues that written communication essentially alters the nature of, not only describing the world but of understanding it.

form in contemporary bureaucratic procedures in general.¹⁰ Also, even in the case of the solely written text presentation, at some point in the dispute career there is likely to have been some form of verbal interaction e.g. when a solely text based presentation is in front of a panel, or more than one individual, as it has to be in a legal aid tribunal, then verbal discussion will ensue.¹¹ However, the essential difference between a non-attended tribunal and an attended tribunal, as noted above, is the reliance on textual documentation only in the former, and the supplementation of textual documentation with verbal documentation in the latter. This difference can be shown not to be an abstract observation if it can be seen, as will be the case, to be demonstrable in the actions in which the participants engage.¹²

The descriptions below are based upon a combination of my direct observations, field notes, tape recordings and personal recollection. The appeal can, I suggest, best be understood as consisting of the interactional accomplishments of the participants in doing the work of decision making processing of a 'tribunal'. It is not intended that each case should be seen as an exemplar by which others can be judged - some form of ideal type - rather these cases were selected on the basis that they clearly illustrate members attending to the work of tribunals.

¹⁰ Ong (1982) as noted above, would not restrict the primacy of the written 'text' only to bureaucratic procedures.

¹¹ Murray (1988:370) notes: "Literacy and orality are not dichotomous, nor do they represent ends of a continuum along which various types of literate and oral modes can be placed as a result of their specific characteristics....Moreover, people move among modes and media even within the same interaction".

¹² I am not suggesting that this is how all cases are handled. Every case is unique and should be seen as being so. However, this uniqueness is not so extreme as to bear no similarities to other phenomenon of a similar form. Any group of people who have to repeat a task, even if it varies on each occasion, will tend to develop some form of routine and here, in a bureaucratic setting, this may be seen to be even more so the case.

4.2a Case One¹³ - A Non-Attended Tribunal Hearing.¹⁴

Venue.

As some venues occur more than once the descriptions of all the case venues are given in Appendix One. At the beginning of each case description the reader will be directed to a description of the relevant venue. For Case One see Appendix One venue number one.

Organizing the Panel.

- 1 cl :Right we'll make a start (0.2) would you care to appoint a
2 chairman?--
3 ? : [we have done (0.4)
4 cl :and that is?
5 ch : [I I got lumbered I'm afraid (.)
6 cl :(name) is the chairwoman (.) alright (.) okay (0.4) one (name of
7 appellant) (2.0) (cough)

The clerk brings the tribunal to a start by attracting everyone's attention¹⁵ and asks if they would like to appoint a chairperson (lines 1 and 2), the chair being appointed from among the independent practitioners by themselves and not by the Legal Aid Board. A panel member indicates that they have already done so (line 3) this having done so displaying their knowledge of the tribunal practices. The chair plays a significant role and the clerk asks whom has been nominated as he needs to record who is performing this role as

¹³ Data session 1 tape 1 case 1.

¹⁴ I had written consent from five appellants to sit in on their case hearings and the clerk had seen fit to bring these five cases forward to be dealt with first. The clerk felt this would be more convenient all round. The cases are not placed in an order for any specific reason so it should not make much difference to the process as it is usually.

¹⁵ See J. M. Atkinson (1979), 'Sequencing and Shared Attentiveness to Court Proceedings', for further discussion of these practices.

well as whom to treat as the chair (line 4).¹⁶ The person nominated as chair indicates that they have been chosen (line 5) to which the clerk says the chair's name as being the chair, seemingly to be in coordination with making a written note of the fact for the record, indicates that they have noted this and states case one and the name of the case (lines 6 and 7).

Searching for an Expert.

- 8 ch :have we got a PI specialist amongst us? (.) you are aren't you?
 9 pm2 : [no
 10 (.) well not really but I
 11 ch : [oh [I thought you did some
 12 pm2 : [I thought erm
 13 (0.2) I thought there was something quite (.) quite serious here (.)-
 14 ch : [yes
 15 pm2 :-and that she ought to certainly have legal aid for (.) a medical
 16 report and then counsels opinion (.)
 17 ch :yes that was my my view as well (.)
 18 pm3 :I I felt the same I thought *prima facie* there appeared to be a case
 19 of negligence (0.4) and there ought to be (.) a grant (0.2) for a
 20 medical report from doctor (name) and for counsel's opinion (0.8)

The chair starts the case, following on from the clerk, by asking if there is a personal injury (P.I.) specialist among the panel and asking directly panel member two, believing it to be the case, if they are one (line 8). Panel member

¹⁶ Before the first case is heard, and at various instances throughout the tribunal session there are 'informal' sections of interaction. The research was not concerned with this informal interaction when it occurred outside of a case, and permission had not been gained to record this interaction. However, what was apparent was that these occasions were used for constituting and maintaining the relevant identities of the panel members. This also happens throughout the interaction that takes place, but is more explicit in the 'unofficial' interaction. This issue of official and unofficial interaction is discussed later in this chapter. Unfortunately the focus on text based activity has not permitted any discussion on the issue of identity and accomplishment of social activities. Identity as a situationally constructed and maintained phenomenon in legal interaction would be possible area of further research in the 'informal' settings of tribunals.

two starts to deny this (line 9) to which the chair indicates surprise (line 11), panel member two carries on to partially deny that they are a specialist in this area (line 10) to which the chair interrupts¹⁷ reiterating their position that they thought they did some of this work (line 11). Panel member two continues what they were saying, and in so doing disattending to the chair's line of inquiry, to state their opinion of the case and to give their recommendation as to what action should be taken (lines 12, 13, 15, and 16). The chair then goes on to state that their view was the same (line 17), to which panel member three states that they were of the same opinion and restates the recommendations of panel member two, adding "negligence" as an aspect of the case and naming the doctor to make the medical report - the doctor's name being named on the appeal claim form (lines 18 to 20). So we can see the case has got off to three of the panel members having made virtually a similar reading of the merits of the case prior to the case hearing.

We see here the chair starts off asking if anyone here is a specialist in the area of law to which the case at hand appertains, after no response she appends an additional question which presupposes there is, and that it is panel member two. However, member two denies this (line 9), but then when this is met with surprise by the chair they modify this to a partial denial (line 10). The panel member attempts to continue but is interrupted by the chair querying the denial. What is interesting is that rather than explaining their denial the panel member proceeds to give their opinion of the case. So we have a disclaimer to expert knowledge by the panel member in response to a question by the chair that would seem to indicate that if there is an expert in this area then they should be the first to give their opinion. The panel member attributed with the expert knowledge disclaims this (line 9), but then immediately produces a modification, or amendment, of this (line 10) in a variation of a 'Yes, but..' or

¹⁷ By interruption in these descriptions what is meant is an instance of a speaker beginning speaking while another member was still speaking. Also, this speaking interruption occurs when the first speaker was hearably intending to continue.

a 'No, but..', thus leaving open the possibility of expertise, before going on to offer up an opinion of the case i.e. a topic change or shift, thus putting the topic on hold (lines 12, 13, 15 and 16), after the chair questions the modification of line twelve (line 11). Note that the members favour the use of "thought" rather than "think" at this stage, possibly as a past tense it allows more flexibility in manouvering ones position. This disclaimer of expertise would seem to remove some of the strength of their opinion, which a claim to expertise would confer upon it. It may be suggested that the reason is that in a peer group of professionals one is cautious about making a definite statement on the off chance that the statement is fallacious and can shown to be so. Thus denial of expertise may be a way of preventing, or at least limiting, any 'loss of face' should one be shown to be incorrect. As it happens, the panel member's position is not met with disagreement but is immediately agreed with by both the chair (line 17), and one of the other panel members (lines 18 to 20). The disclaimer by the panel member may also be seen as a case of 'modesty' or of a tendency not to meet compliments with agreements.¹⁸

Assessing the Case.

- 21 ch :I mean I felt the quantum was (0.2) quite substantial (0.4)-
 22 pm2 : [might well
 23 -be (.)
 24 ch :-if they got home on liability (0.2) errm I felt (.) not able to (.)-
 25 pm3 : [yes
 26 pm2 : [yes
 27 ch :-comment on the medical side because it does seem horrendously
 28 complicated and there is all sorts of different medical conditions
 29 (.)
 30 pm3 :that's right (.) but we had no actual medical report before that-
 31 pm2 : [umm
 32 ch : [no
 33 pm3 :-did we (0.2) so
 34 ch : [no I thought that errr that was unfortunate omission but

¹⁸ See Pomerantz (1978), 'Compliment Responses: Notes on the Co-operation of Multiple Constraints'.

39) and panel member three continues to state that they thought that there did seem to be a valid case (line 40).

The chair introduces the possibility of 'liability' into the discussion, and if 'liability' can be proven by the appellant in the legal case at court (although no comments are made as to the merits of the case in its ability to do so as it is not the role of the tribunal to do), then large monies i.e. quantum size, would be involved. Reference to quantum relates to the fact that one of the criteria for legal aid funding for a case is that quantum should exceed one thousand pounds, smaller amounts not being eligible. Hence not making the thousand pounds would be a legitimate reason for refusing the case. By establishing the fact between them that if the case was successful it would go beyond this threshold, the panel create a reason for granting the case - although it could still be rejected on other criteria.

Obtaining a Unanimous Decision.

- 41 ch :do you agree with this (name of)? (0.2)
42 pm1 :well speaking as the err divorce specialist it looked like a good
43 PI claim to me (.)
44 pm3 :(laugh) (0.8)
45 pm1 :yeah (.) I mean its if it is going to go home on liability it is
46 certainly going to go over a thousand in damages (unclear) (.) by-
47 ch : [(unclear)
48 pm1 :-a street (.)
49 ch :I think it's seven thousand for loss of life isn't it? (0.2) they (.)
50 (clerk's forename) can probably help us on that (0.2) plus uh (.) -
51 pm? : [yes
52 pm? : [mmm
53 ch :-a lump sum
54 pm3 : [bereavement damages you mean (.)
55 ch :bereavement damages yes (.) plus the pain and suffering that the-
56 pm? : [ummm [ummm
57 ch :-child obviously experienced (0.2) throughout his life so I would-
58 pm? : [(unclear)
59 ch :-think that it's a very substantial claim (.)
60 pm1? :yep (.) so I would say (.) we should grant it (.)
61 ch :can we give a limited certificate for medical reports counsel's
62 opinion on merits (.) please (clerk' forename) on that one (5.0)

Following this, and after a short pause, the chair asks panel member one, who until now has remained silent, if they agree with the view of the case taken by panel member three - and, seemingly, the others (line 41). Here we can see the chair doing the work of a chairperson rather than a panel member.²⁰ Panel member one, who until this point has remained silent, responds to this by stating that as a divorce specialist it looked like a good personal injury claim to them (line 42 and 43). This is an accounting for their silence performed through a joke, but one which still allows them to offer an opinion - it may also relate back to the earlier issue of expertise with here expertise being admitted but in a area not relevant to this case.²¹ This elicits a laugh from panel member three (line 44).²² Panel member one continues that if it succeeds as being a liability case it will certainly go over one thousand pounds (lines 45, 46 and 48). One thousand pounds being the minimum threshold for a claim which can be made for legal aid assistance of this form. The chair then states that they believe that the award for "loss of life" is seven thousand pounds plus a lump sum and, after

²⁰ The chair is both a chair and a panel member and as such can be seen to be involved in two sets of compatible activities. In the descriptions of the data the title of 'chair' is used as an omni-relevant device, even when the chair is engaged in activities that may not necessarily be those of a 'chair'. However, this use of the category chair is demonstrably relevant to the on-going activities, e.g. focusing the panel's deliberations. Sacks states: "An 'omni-relevant device' is one that is relevant to a setting via the fact that there are some activities that are known to get done in that setting, that have no special slot in it, i.e., do not follow any given last occurrence, but when they are appropriate, they have priority. Where, further, it is the business of, say, some single person located via the 'omni-present device,' to do that, and the business of other located via that device, to let it get done. (Sacks Vol 2 1992:313-314)

²¹ It is notable that the expertise that is discussed by the panel in this case is expertise internal to the practise of law and bearing on the panel's tasks. This expertise within law differs from expertise that may be called upon in the form of expert witnesses, or the documentary reports of such experts e.g. medical reports.

²² For a discussion of the role of laughter in interaction see Glenn (1995).

a lack of response by other panel members, asks for verification on this from the clerk (lines 49, 50 and 53). Panel member three clarifies/rectifies that the chair is talking about bereavement damages (lines 54), to which the chair confirms, plus money for the child's "pain and suffering" throughout life which they believe would make this a "very substantial claim" (lines 55, 57 and 59). Panel member one concurs with this and states that they think they should grant it (line 60). Thus all the panel members agree that the case is to be allowed its appeal. The chair then asks/instructs the clerk to note for the record that the case judgement be given as a limited certificate for a medical report and a counsels' opinion as to the merits of the case (lines 61 and 62). After a five second pause in which the clerk makes a note of the panel's judgement on the case, the clerk confirms the chair's request ending the case, and moves proceedings on to the next case (line 63).

As we observe the case goes on to be granted legal aid, though limited to a medical report and counsel's opinion. Of interest is that the chair specifically asks panel member one who has not yet offered an opinion on the case, whether they agree with panel member three's statement (line 41). This act by the chair can be seen to be one of checking if the panel is gaining a consensus, the panel having a consensus being a preferable state of affairs. The panel member would seem to have the possibility of endorsing the view of the rest of the panel or discussing the problems of the case on whatever grounds. However, what panel member one does is actually make an opinion but with a disclaimer (lines 42 and 43). By again raising the issue of expertise panel member one states that the claim "looked" good, but that they were speaking as someone specialising in another area of law. This statement is taken as being witty by the rest of the panel (line 44). Panel member one continues this statement by agreeing with the chair's earlier statement (lines 21 and 24), that is if the case managed to prove liability then it would pass the thousand pound level i.e. passing one of the criteria pertinent to the acceptance of the case (lines 45, 46 and 48). This is taken by the chair as the panel having a consensus on the merits of the case, with reference to the quantum surpassing one thousand

pounds, and goes on to emphasise this point by referencing statutory levels of compensation (lines 49, 50 and 53). The chair states that the clerk may provide assistance on this point (line 50), although the clerk does not respond.

After what can be heard as a minor technical terminology correction by panel member three (line 54), in that he repeats the correction by panel member three of his designation "loss of life" (line 49). The chair goes on to reemphasise the case's merits in terms of possible levels of quantum being "a very substantial claim" (line 59). It is panel member one though who, following this statement by the chair, suggests that the panel should accept the case (line 60). It is noteworthy that it is panel member one who was last to give their opinion and to provide the desired consensus that attempts, and succeeds, in finalising agreement on the case. It is the chair who brings the case to a close by asking/instructing the clerk for limitations in terms of what the award will be for (lines 61 and 62). This statement by the chair should also be noted in that it is directed not only to the clerk as such, but also to the record that the clerk makes of the decision of the panel. The chair's statement is for the record. The clerk acknowledges this and then moves the tribunal on to the next case (line 63).

4.2b Summary.

We observe that this non-attended text only tribunal was completed in a single 'phase', the issue of 'phase' will become apparent in the following attended case. The work of this case entailed the 'glosses' of what were described as: organising the panel; searching for an expert; assessing the case; and obtaining a unanimous decision. The actual activities of which have been described using 'thick' or 'rich' description. It is not intended that it be assumed that the work of the tribunal in all non-attended cases are performed in the same manner, though we can assume that there are similarities even if each inevitably has its own dynamics and 'requirements'.

Although there are a large number of activities that could be focused

upon, this case hearing can be summarised as: a panel member gives an opinion of the case, although they denied expertise. The denial of expertise is not however a denial of being the person most qualified relative to the other co-participants. An interpretation is made of the case and then agreement is offered or with-held. A case is made for why it should be granted (although it could have been for rejection), possible problems e.g. lack of specific documents are noted, and in this case 'overlooked'. Consensus is established and a decision made and its implications delivered to the clerk. The whole time the panel only have recourse to the documents provided by the Legal Aid Board, which include those provided by the appellant, any input and argument on behalf of the appellant can only be made by the panel themselves working from the documents provided for them.

A specific instance worthy of note is when panel member three states that there had not been a medical report carried out before the legal aid application (line 30 and 33), to which the chair states if there is one but it has not been included it would be a shame (lines 34 and 35). The chair is not totally certain that the documentation in question not available, but is limited in pursuing this as the case is that of a non-attending appellant, where information lacking or not clear in the documents can not be checked with the appellant. The chair when drawing attention to the medical details that "seem horrendously complicated" (lines 27 and 28) would again seem to indicate an issue on which an appellant might shed some light as it seems that the medical details provided are not in a suitable form for the panel to use to make any judgement.

We will now look at an attended tribunal.

4.2c Case Two²³ - An Attended Tribunal Hearing.

Venue. See Appendix One Venue Number Two.

²³ Data session 9 tape 1 case 2.

Moving Orientation to a New Case.

shuffling of paperwork as previous case vacates the room

- 1 cl :Neil you're ok for the next one too (0.4)
2 pm1 :is (unclear) around (.)
3 cl :yes (2.0)

From the end of the last case footsteps of the last attender leaving can be heard on the wooden floor, and there is the rustling of documents as the paperwork of the previous and up-coming case are sorted by the panel and the legal aid clerk. Unfortunately my observation of the tribunal does not allow my to say with confidence exactly what activities are engaged in while doing this. The transcript begins with the clerk informing the researcher that they have permission from the appellant to record and sit in on the case (line 1). Immediately the clerk is asked a question - which is unclear on the tape - to which the clerk answers in the positive (lines 2 and 3). The question is asked while the other members are still busy sorting their papers and before the panel gets down 'properly' to the business of the new case.

What we can see here is that the clerk, while the previous case appellant is leaving the room, starts the process orienting the panel and researcher to the next case. This is achieved via reference to the researcher.²⁴

Discussing the Case and Deciding on what to ask the Appellant.

Establishing 'Formal' Focus.

- 4 pm3 :is this number two (0.2)
5 cl :(appellant's name) yes (5.0)

²⁴ A likely reason as to why I would have been orientated to here is possibly because of my need to know whether or not to switch off the tape recorder before deliberations began. This would have also served to alert the panel that the new case was about to begin.

Panel member three (line 4) questions if the next case is number two on the agenda, and in so doing seems to initiate the first move towards 'formal' interaction.²⁵ The question is answered with the name of the appellant of the next case and confirmation of the question (line 5). The documents which the panel members receive have a cover sheet with both a name and a case number for the session. By effectively reciting both name and case number the clerk allows the panel members to confirm that they have moved on to the correct case documents. Here, I suggest we can see the focusing of members onto the specific case at hand and the documentation relevant to it.

Establishing formal orientation to the work of Decision making.

6 ch :now in the normal way we we (.) we look at this in case (.) we
7 have formed a view of reading (.) on this occasion we have got (.)
8 quite a lot of paperwork (2.0)

After a short pause the chairperson (lines 6 to 8) moves the session into the 'formal' stage proper by stating explicitly that they, the panel members look at the paperwork they have brought to the tribunal. Having been supplied with the case documentation prior to the hearing, to see if, in their individual

²⁵ The difference between formal and informal is discussed here in a largely unproblematic fashion (which it is for the panel members), although in practice delineating between the two in the data is not so unproblematic. As with the contrast between the scientific and everyday attitudes towards the world in the phenomenology of Alfred Schutz, the two blur into one another in practice (Lynch 1988:84-86). This shift is achieved quite quickly but is not a sudden, or at least jarring, shift. Neither is it just verbal, it involves a physical display of bodily orientation and expression of attention, phenomena that are not recorded on audio tape. Unfortunately, the use of these terms appears then as a analytical device, and to the extent that I have chosen to emphasize this aspect of the data it is. Thus we can see that the distinction is in some sense arbitrary, but it does seem to be attended to, the question is to what extent emphasis should be given to it? Arguably only that given to it by the members themselves, unfortunately it probably lends itself too well to the textual practices of data description and becomes treated as a generic and uniform phenomenon. Some clarity to this is provided by J. M. Atkinson (1982).

readings, they have formed an opinion of the merits of the case. The chair distinctly references a "normal way" (line 6), indicating that there is some normative pattern to how they 'usually' conduct their affairs. By making this statement, he seems to be providing a common temporal 'present' in the 'systematic procedures' that the members undertake when evaluating a case. The case evaluation starts 'properly' here, I suggest, in that it is directed to all the panel assembled and to convene their attention to the act of decision making, whereas panel member three's and the clerk's statement's (lines 4 & 5) do not seem to necessarily address the whole panel in the same manner.²⁶ in relation to line one above the clerk by addressing the researcher of the possibility of recording the next case hearing, 'indirectly' informs the other panel members of progression of the tribunal business. This develops in line to the inquiry to the clerk of the next case number, this and the answer from the clerk are hearable by all panel members. This is then followed by the chair addressing the other panel members in line six, this he does in a manner which indicates, and is attended to (line 9), as being in his capacity of chair of the panel, this relates back the issue of omni-relevant devices discussed above. Here we can seem the move to 'formality' as being built up by drawing the members attention together, and the adoption of the formally designated role the chair.

The chair also notes that this case has a lot of documentation attending the case, this draws the attention of the panel member's to the official documentation, and the actions they have taken towards this in their capacity as tribunal panel member (lines 6 to 8). This would seem to work alongside the activities described above in moving to the 'formal' activities of the tribunal.

²⁶ The reader might think that this statement by the chair of 'normal' procedure is somewhat peculiar as the panel would be expected to be aware of the procedures. However, although it could therefore be interpreted as being intended for my benefit as a researcher present at the tribunal I do not believe this to be the case but rather, as described above, as a method of introducing 'formality' to the proceedings.

Deciding on a Course of Action.

9 pm2 :counsel's er put a lot of doubt on it (unclear) unless he comes up
10 with that (.) gets us him over that hurdle (0.4) he must fail (0.6)
11 ch :right (.) then I think we can do no better than have him in (.)
12 cl :okay (35.0)

The statement from panel member two (lines 9 and 10) refers to one of the documents in front of the panel, which states the counsel's opinion of the merits of the case. This is that unless the appellant can provide information which can overcome the counsel's doubts the appellant must fail in their appeal. Of interest is how the beginning of this utterance produces a frame, based on the 'counsel's opinion', for a negative appraisal of the case by panel member two. The chair agrees with this and states that they "can do no better than have him in" and speak to the appellant directly (line 11), as the whole appeal would appear to hinge on this point. I suggest this can be seen as signalling that they have completed the work of deciding on their reading of the case and what to talk to the appellant about. They can now move to the work of discussing the case with the appellant.²⁷ This is not to suggest that this move cannot be halted by the other panel members. The Legal Aid Board clerk acknowledges this (line 12) and leaves to bring in the appellant. Note the indirectness of this request, yet the clerk treats this as expecting action. The clerk certainly appears to take this general statement to signal that they have reached the end of what, I suggest, can be seen as the first general work task. Of course line 11 can be seen as both a signal directly to the clerk to bring in the appellant - one of the clerk's tasks - while also performing its general function as agreement and signalling the end of a first phase. The actual phrasing of line 11 also acts to legitimate the

²⁷ As we shall see in Section Four the move to the discussion in 'phase two' with the appellant is not without variations in practice, although if an appellant has come to the tribunal the panel seem always to talk to the appellant. However, even if an appellant is in attendance, a decision on the case may be made based upon the documentation and thus rendering it very similar in decision making to a non-attended case.

move to the next phase by accounting for and warranting such a step. Note that the appellant is brought in after very little discussion of the texts. This could be because the panel see the appellant as an extra resource by which assessment can be made.

Transition Period.

- 13 Clerk leaves the room to get the attending appellant
14 ch :good opinion isn't it (0.4)
15 pm2 :yeah (20.0)
16 Clerk returns from waiting room with appellant

Following the end of the first phase we have what I suggest to be a transition period or less 'formal' period (lines 13 to 16). It essentially consists of the period which it takes the clerk to go to the waiting room and bring in the appellant. This period may vary in length and may or may not involve some discussion by the panel members. It can be seen as indicating the boundaries between possibly discrete activities, though work does often get performed in this period. At first the members are engaged in reading their documents, which is a 'typical' activity in such periods. We can see in this case that, after a period of thirty five seconds (line 12), the chair states a positive appraisal of the counsel's opinion (line 14). Panel member two agrees (line 15) without pursuing further. After another 20 seconds the clerk returns with the appellant allowing the work of discussing the case with the appellant to begin.

The 'transition period' provides the opportunity for doing important work i.e. looking through documents and reflecting upon action. Although these activities are not always verbally displayed and hence not recorded, that they are looking, and to some extent how they are looking, is displayed and made available.

Discussing the Case with the Appellant.

Orientating the Appellant and Panel to the Case Documentation.

17 cl : (unclear) (.)
18 ap : okay (1.4)
19 cl : please sit down mister (name) (.)
20 ap : thank you (5.0)
21 ch : mister (name of clerk) are you going to
22 cl : mister (name) you had (.) legal aid (.) err last year to enable you
23 to (.) be represented in the case involving (company name) (.)
24 ap : yes (.)
25 cl : err the legal aid certificate has been discharged by the (.) legal aid
26 board staff you are now (.) exercising your right of appeal to the
27 area committee this afternoon (.)
28 ap : umhuh (.)
29 cl : err the members of the committee who are here this afternoon
30 who are all (.) quite independent of the legal aid board have had
31 a chance to consider the papers (.) they'll have some papers er
32 they'll have some questions for you and you can add what you
33 wish afterwards (.) the committee have had the counsel's opinion
34 of the 4th of november (.) err your notice of appeal (.) a letter ff
35 (.) from you dated the 9th of january (.) and various other papers
36 (0.4)

Once the clerk returns there are the initial practicalities of getting the appellant seated (lines 17 to 20), then the chair asks the clerk if they are going to start (line 21) at which point the clerk starts before the request is completed (line 22). This can be seen, I suggest, as being where the 'informal' mode finishes and 'formal' work on the case begins again. The clerk begins what can be seen as the second 'task' 'properly', by stating in a more 'formal' manner²⁸ in this instance also indicated by lexical choice, the case history of the appellants legal aid application (lines 22, 23, 25, 26 and 27). This work of the clerk in some sense is provided for by the prior actions of getting the appellant seated and facing the panel, thus creating an expectation of activity in all the members present. There is a five second pause after the appellant takes their seat (line 20), this silence by all parties seems to provide the context for the

²⁸ The transcript does not include intonation indicators as they are not really the main aspect of the analysis.

move to 'formal' activities. The fact that the appellant does not ask if they saw the football match of the previous night, or the chair ask the appellant if he has the latest test score, etc. which provides the move to formality with any preamble drawing together the members attentions. This expectation of the start of the formal proceedings is taken up by the clerk who addresses the appellant. This address is a formal one "Mr. ...", also, the rest of the clerk's talk is distinguished by a formal and 'legal' lexical choice. Thus, the formal proceedings of the tribunal can be seen as being indicated by the tone and lexical choice of the clerk. This is all collaborated in by the appellant through the use of minimal responses, the absence of responses also helping to form the 'formal' in contrast to 'informal' nature of the interaction.²⁹

This, I suggest, can be seen as a chance to verify that the case and appellant are one and the same, the appellant verifying that they have had legal aid to represent the case described by the clerk (line 24). Further, the clerk describes the past action by the legal aid board area office, that of 'discharging' it i.e. cancelling the funding of any further action chargeable by the appellants solicitors to the Legal Aid Board, which the appellant is now appealing against - which the appellant acknowledges (line 28). The clerk then goes on to state that the panel members are independent of the Legal Aid Board and have looked at the case papers before convening (lines 29 to 31). The clerk then informs the appellant how the case will be heard procedurally which also informs the appellant what they are expected to do themselves (lines 31 and 33). Finally, the clerk informs the appellant of the documents that the panel have before them (line 33 to 36).

Introducing the Panel and Tribunal Process to the Appellant.

37 ch :mister (name) my name is (name) I'm sitting with mister (name)
38 on my right (.) mister (name) and mister (name) (.) erm as mister

²⁹ See E. Schegloff (1982b) 'Discourse as an Interactional Achievement: Some uses of "uh huh" and Things that Come Between Sentences'.

39 (clerk's name) has said we've read errm (.) a statement (.) that you
40 gave (.) errm (.) which is (with us) (.) the helpful background you
41 (.) give the (0.2) reasons (.) (in this) the statement (.) that
42 accompanied your application I believe (.) you gave five reasons
43 why (.) you (.) felt that the err the (.) court judgement should be
44 set aside (.) you then got (.) mister (name) I think his name is his
45 opinion (.) errm which is (.) err though you describe it a interim
46 opinion it is (.) fairly (.) conclusive in my personal view but that
47 is dated the 4th of November 1994 (0.2) und then we have a
48 statement from you (.) erm regarding the notice of appeal (.) erm
49 and a further letter mister (clerks name) said (.) now as I say we
50 have read all that (.) perhaps (.) err the way we should handle the
51 appeal if for you to (.) add to those grounds if you want to (.)
52 we'll then ask you questions so perhaps you'd like to shoot away
53 (.)

Once the clerk has finished the chair of the panel introduces himself and the rest of the panel by name to the appellant and then acknowledges that, as the clerk had said previously, they have read the documents submitted with the notice of appeal (line 37 to 40). The absence of response here helps maintain the formality of the discourse. The chair then notes aspects of one of the documents i.e. a list of five reasons why the counsel's view of the case should be set aside (lines 40 to 44), seemingly the appeal against refusal of legal aid document or the accompanying letter, which refers to the counsel's opinion (another document they have in front of them). The chair then goes on to give an assessment of the counsel's opinion in doing this with reference to "my personal view" (lines 46), thereby indicating to some extent his position towards the case to the applicant. However, by claiming it as his personal view he seems to be marking that it is not the decided opinion of the panel. The chair seems to have temporarily dropped from his role of speaking on behalf of the panel. The chair then appears to move back to speaking as the chair on the behalf of the panel with "but that is dated", it appears that the move from personal opinion to a statement of 'fact' in the form of a date stamp. It is the position of this comment in the midst of the listing of the documents before the tribunal that gives it an 'ad hoc' appearance. The chair provides for this occasion by placing a reported opinion of the appellant, "you describe it a

interim opinion" (lines 45 to 47), and then giving their contrasting opinion. The intonation makes it sound separate from the surrounding talk, and hence its 'ad hocness', however, it can also be seen as setting an agenda for discussion by the appellant. The chair continues by listing the other documents they have and again states that these have been read (lines 47 to 49). This is the same list as the clerk made though without mention of "various other documents" and hence reinforces the named documents from those of a 'downgraded' distinction (as mentioned above). Finally, the chair suggests the manner in which the appeal should continue i.e. the appellant adding to the documents a verbal case to which the panel can then attend, then passes the floor over to the appellant (lines 49 to 53).

The Emergence of a 'Problem'.

- 54 ap :(cough) I don't think I have anything to add to the statement (.)
 55 ch :nothing at all? (.)
 56 ap :no (.) I mean it's it's all set out there (.) and and I don't think
 57 there is any point in adding anything to that (0.2) I I obviously
 58 don't agree with you in in respect of the (.) of thee barrister's
 59 opinion (.)
 60 ch :in wha: have you got a copy of there (.)
 61 ap :yes I have (.)
 62 ch :well sh.shall we refer to it because I think that it's quite important
 63 that we don't get (.) at crossed purposes on this (.)
 64 ap :okay
 65 ch :cause after all it's on the basis of this appeal that urm (.) legal aid
 66 is withdrawn (7.0)

However, the appellants response to being given the floor is to state that they have nothing else to add to the written documentation (line 54). The appellant has been given the opportunity to give an oral account in support of their written account, and is stating that they believe that it is unnecessary for them to do so. The chair further queries the appellant (line 55), a query that makes the appellant account for their position by stating that they see no reason to add more to the documentation they have provided, and that they have a

different view of the barrister's i.e. counsel's, opinion to the chair (lines 56 to 59). This refusal of the appellant to add verbally to the documents, and in so doing declining the activities the chair had anticipated for them, is negotiated by the chair then asking the appellant if they have a copy of the counsel's opinion to which the appellant replies in the affirmative (lines 60 and 61). The chair then suggests that they start referring directly to the document so as to continue the hearing without confusion and to clarify their positions on the counsel's opinion - to which the appellant agrees (lines 62 to 64). The chair then states the importance of the hearing for the appellants legal aid (lines 65 and 66). Thus the chair moves beyond the initial impasse over the appellants wish not to add to their written statement.

Using Documents to Focus on the 'Problem'.

67	ap	:I:I thought I'd actually (referred to): in in the barrister's opinion
68		he asks for some further information (.) from thee (.) uh (.) two
69		directors of the company concerned (0.2)
70	ch	:can (.) can you point to them now (33.0)
71	ap	:I'm not sure I've found it (35.0) in twenty nine is it is he talks
72		(0.4) about thee err (0.4) assertions and (.) evidence before them
73		to support the third defendant's contentions (4.6)
74	ch	:you being a second defendant (.) they're saying "those instructing
75		you should contact the person pertinent for (unclear) cite all the
76		evidence in the possession of the defendants" (0.2)
77	ap	:and I'd I'd obtained that additional information which the barrister
78		hasn't seen (.)
79	ch	:I see (0.4)
80	ap	:and what I was asking was (.) that he could see the additional
81		information (.) that I have obtained (.) since he he wrote his report
82		(.)

The appellant starts their response to this request to look at the barrister's opinion by stating "I thought I'd actually (referred to)" but does not continue the sentence, rather they focus on the barrister's opinion as requested by the chair (lines 67 to 69). That the appellant does not continue the sentence is significant as it appears as if they were about to refer to a document they had

produced after the barrister's opinion, the importance of which appears later.³⁰ However, the appellant states that the counsel's opinion asked for further information about the case, to which the chair asks the appellant to point out where this is in the document (line 70). This takes the appellant some time to do but they do eventually manage to state where it is in the document and paraphrase what it says (lines 71 to 73). The chair then goes on to quote directly from the document the request for further information (lines 74 to 76) to which the appellant states that they have obtained this further information that the counsel requested, but the counsel had not seen it (lines 77 and 78), and that the request for legal aid is so that the counsel can see it (lines 80 to 82).

Narrowing the Issues Down.

- 83 ch :so really (.) that (.) you're really hanging your appeal on that
84 point particularly? (0.4) is that right you're not challenging (.) the
85 other points (.) in thee eh
86 ap : [well (.) the appeal to you as far as I
87 understand which is in in respect of (.) allowing me to go back to
88 the barrister so that he can complete his opinion (.)
89 ch : [okay
90 ch :right (0.4)
91 ap :in terms of the appeal against the whole case th.that this is not up
92 to me to talk to you about today (.)
93 ch :quite (0.2)
94 ap :I mean if I'm wrong I mean
95 ch :no no that's fine mister (name) that's that's actually quite helpful
96 (.) that we've narrowed (.) we've narrowed the issue down I mean
97 (0.2) lets just deal with it on that level to start with (.) see if we
98 can not
99 ap : [and the other thing that I should say is the statement I have
100 made was actually drafted between my solicitor and I (.)

The chair then clarifies with the appellant that this is the main aspect of the appeal, and that the appellant is not challenging other points made against

³⁰ This observation may suffer from being informed by later events in the case. Certainly the panel did not seem to pick up on it as a significant utterance.

the case (lines 83 to 85). Though he does not get to say what those points are, as the appellant enters the statement that their understanding of the aim of the appeal is to get the counsel to look at the additional information (lines 86 to 88). The appellant is here setting and clarifying what they see to be the boundaries of the issue at hand. The chair signals that they now understand this (lines 89 and 90), while the appellant then adds that they do not think that they have to talk about the case as a whole on this occasion (lines 91 and 92), to which the chair concurs (line 93). The use of "quite" (line 93) by the chair would appear to be a form of 'weak' agreement, as evidenced by the appellants response (line 94).

The appellant then asks to be corrected if it is not the case that the claim, and hence discussion, is about monies to put new materials before the barrister (line 94). To which the chair replies that it is fine to claim for monies to do that, and that it has been useful to focus the debate to that point and that they should deal with it at that level to begin with (lines 95 to 98). Here we have almost a reversal of roles. This action seems to gain 'emphatic' agreement from the chair, who states explicitly its usefulness. This may be because he recognises this activity as one he might be expected to perform to preface, does here the resetting of the agenda for discussion. At this point, and interrupting the chair as he is about to make a suggestion, the appellant informs the panel that the appeal document was drawn up jointly by themselves and their solicitor (lines 99 and 100). By saying this the appellant can be seen, I suggest, to be possibly trying to add weight to the strength of argument in the text i.e. upgrade its status, by stating that it was co-authored by the appellant's solicitor, it may also be seen as an attempt by the appellant to have the focus of the discussion move from the barrister's opinion to their appeal documents and the additional information contained. This may account for why it is done at this point, just as the chair is about to reset the agenda for discussion.

Finding the Problem.

101 ch :yes sure (.) yes (0.2)
 102 pm? :I have nothing else (.)
 103 ch :okay (2.0)
 104 pm2 :I can anticipate what your answer will be but this additional
 105 information that you've found is it encouraging (0.2) do you feel?
 106 (1.4)
 107 ap :yes a do (2.0)
 108 pm1 :I notice (.) on the (.) statement in support the err notice of appeal
 109 that a (.) bundle of additional evidence was submitted with that (.)
 110 err we haven't seen it (1.0) including of course the comments from
 111 the legal aid board (.) and er how extensive that (.) bundle is
 112 which (unclear)
 113 ap : [well that's that's the bundle that was sent to the legal aid
 114 board (1.5)
 115 ch :hhhhh (0.4)

After acknowledging the last statement by the appellant (line 101), in a fashion which with the use of "yes sure" seems a little dismissal of this point. Certainly, it is not taken up for further discussion by the panel. One of the panel members states they have nothing additional to ask the appellant (line 102) which the chair acknowledges (line 103), then, after two a second pause panel member two asks the appellant a question (line 104 to 106). It seems that the extended silences at the end of the chair's comments (lines 101 and 103), are treated as 'problematic' and it is only after two of these pauses other panel members join in the discussion. It would be likely here that the chair has used non-verbal signalling e.g. turning-towards, to be an invite to the other panel members to ask any questions they have. Panel member two, taking-up the second of these pauses, asks the appellant if they think the new information will make the case stronger, but it is interesting that the question is prefaced with "I can anticipate what your answer will be but.." (lines 104). This preface to the question would seem to indicated to the others that the panel member knew what the likely response to the question, possibly detracting from any naïvety that it might be attributed with. The appellant responds in the affirmative without any elaboration (line 107). Following this, and a third pause, panel member one asks the appellant about the 'bundle' of information referred to in their appeal document which they, the panel, have not seen (lines 108 to 112),

to which the appellant responds that the 'bundle' was sent to the legal aid board (lines 113 and 114). At this the chair gives an audible sigh (line 115).³¹

Overcoming the Problem.

116 pm1 :donno what (.) what (.) we could consider today (1.0)
 117 ch :that addresses the err point (unclear) that if we if we turn to
 118 paragraph (.) paragraph thirty in (account) (.) the final closing
 119 paragraph (.) he sez that "in my opinion unless the second
 120 defendant is able to establish the plaintiff failed to mitigate its loss
 121 or actively worsened it by failing to secure satisfactory (unclear)
 122 was carried out or a fair price was obtained (0.6) err then no
 123 prospects of setting aside the judgement" (unclear) (.) though I
 124 take it that the additional evidence you've been able to produce
 125 addresses that particular flaw
 126 ap : [yes it does (.) the oth: the other two
 127 defendants are (.) are directors company that actually borrowed the
 128 money I'm not (0.2)
 129 ch :fine (.)
 130 pm2 :the there's also the question of contr: seeking contribution from
 131 the other (.) two defendants (mumble) (0.2)
 132 ch :good (.) okay (.) thank you very much (.) have you any other
 133 questions? (0.4) no (0.2) fine mister (name) if you'd like to (.)
 134 (wait) out side (.) you can leave your papers here if you like (.)
 135 leave your coat (.) sorry (0.2)

³¹ This sigh may well be a change-of-state token (Heritage 1984), but it is not the case that what can be seen here is a reality disjuncture in terms of those described by Pollner (1975), since it is not the case that one party has a 'true' understanding of the situation to which the other is converted. Rather, here it is the case that neither party understands the full nature of their problems until the missing documentation comes to light. This also goes some way to answering the empirical question raised by Pollner, "If reality disjunctures are infused with potentially endless equivocalities, how are they ever resolved?". In this case it is through the locating of a reason for the 'disjuncture' via the work of a 'larger' practical activity, in this case the work of doing a tribunal. In this case such a resolution also avoids consequence of discrediting the other's perception of reality in favour of that of one party, instead a suitable 'resolution' is located which sustains the credibility of prior perceptions of both parties with a mutual commitment to the 'new version'. This is also an example of 'rationalization' as a practical activity that creates rather destroys our world (See Peter Eglin:1979). The position here, following Lynch's (1993:37) discussion is anti-foundational not anti-objectivist.

Once the chair has given a sigh of acknowledgement to the situation that has occurred i.e. an incomplete set of documents having been given to the panel for consideration. Panel member two states that they do not know what they can "consider today" (line 115), which seems to indicate that they believe that documentation necessary for the appeal is not available to them. However, the chair, not directly responding to the previous comment of the panel member, moves to overcome this problem by again referring to counsel's opinion (lines 117 to 125), and refers everyone to paragraph thirty which the chair then reads (lines 119 to 123). The quote refers to facts that the appellant needs to establish for the case to have a chance in court, the chair then asks the appellant if they have been able to establish these (lines 123 to 125), to which the appellant confirms and elaborates on (lines 126 to 128) which the chair then acknowledges (line 129).

After this panel member two raises the issue of contributions in terms of finance towards the case (lines 130 and 131), but this issue is not taken up as the chair starts to bring this second phase of the tribunal to a close by asking if there are any further questions (lines 132 and 133). After no immediate response to their question the chair asks the appellant if they would mind waiting outside, but adding that they could leave their belongings where they were (lines 133 to 135) thus bringing phase two to a close. The appellant then thanks the chair (line 136).

Considering the Case and Coming to a Decision.

Making a Decision.

137 pm1 :counsel's opinion (0.2)
 138 pm2 :well I'd agree (mumble)
 139 pm1 :counsel's opinion (.)
 140 pm3 :that's me (.)
 141 ch :well he's done it he's set aside thee eh (.) he's set aside (1.4) well

142 to his satisfaction anyway (laughs) err counsel's erm (1.0)
 143 (unclear) (haven't they) (.)
 144 pm2&3:yeah mmmm
 145 pm1 : [if he's got the other evidence (.)
 146 ? :(mixed talk) counsel's opinion
 147 pm3? : [that was my initial reaction in this case
 148 cl : [okay right
 149 I'll get him back in now (1.8)
 150 ch :good good okay so now can we limit (.) the certificate here to
 151 obtaining (.) counsel's further opinion (.)
 152 pm1 : [(unclear)
 153 cl :yes certainly (.)
 154 pm2 :oh yes I think that's (unclear) (2.0)
 155 ch :okaayy (1.0)
 156 cl :thankyou (34.0)

After a ten second silence as the appellant leaves the room, panel member one suggests that the appellant be awarded the funds to seek a counsel's opinion as the panel's decision (line 137), to which panel member two agrees (line 138). Panel member one repeats their suggestion (line 139) to which panel member three agrees that it is their opinion too (line 140), the chair then states that the appellant has seemingly met the requirements of the original counsel's opinion (lines 141 to 143) to which the other panel members two and three agree, and so come to a unanimous decision. Embedded in this is the statement by the chair that the appellant has "set aside"³² the counsel's opinion "well to his satisfaction anyway" (lines 141 and 142), and gives a short laugh. The laughter may be due to the fact that it is to their satisfaction, rather than the appellants that is of importance but that the missing document does not allow them to do their work 'to the letter of the law'. It is of note that panel member one states here "if he's got the other evidence" (line 145), thus giving voice to the fact that the panel do not know, because it has not been provided by the

³² Both "set aside" and "counsel's opinion" are examples of the use of terms which designate routine formulations for common activities in the practice of law. To "set aside" being used to describe the practice of removing from consideration of an object, opinion, or testimony as relevant to a case. In a different fashion "counsel's opinion" designates a quite routine award decision, one of several options, available to the tribunal panel.

Legal Aid Board, what the new evidence is like, this statement is not followed up by the rest of the panel. Technically since they do not have the evidence on which to make a judgement no judgement should be made, however this 'problem' does not prevent the panel from coming to a decision on the case. Though this is achieved by ignoring the observation that they do not have sufficient evidence, which panel member one's observation (line 145) can be seen as making.

Following this there is some unclear talk about counsel's opinion (line 146), and to which panel member three states that that was their initial reaction (line 147). At this point the clerk recognises that the panel has made its decision and he indicates that he will bring the appellant back in (line 148 and 149). Note that the clerk is monitoring the case and can recognise when the panel has reached the end of a phase, though the clerk is not a decision maker on the panel. At this point the chair, indicating that he is generally happy with proceedings, asks the clerk if the award can be limited to another opinion of the counsel (lines 150 and 151). The clerk indicates that this is possible (line 153), to which other panel member two indicates their satisfaction with their decision (lines 154). The chair states "okay" (line 155) and this is taken as indicating the end of the phase by the clerk, the clerk then thanks the panel for their decision on the case and thus brings phase three to a close (line 151).

Delivering the Decision of the Panel to the Appellant.

Granting Limited Legal Aid.

157		clerk leaves to get the attender and then returns
158	ch	:thankyou for coming today mister (name) (.) it's always (.)
159		very good to see an appellant rather than do it on paper (.)
160	ap	:well I'm sorry you didn't have all the papers I just
161	ch	: [no no no you
162		don't (.) no no (.) you've satisfied us (0.2) you should have
163		another opinion from (barrister's name) (.) therefore your
164		certificate will be (.) I don't know what the word is renewed
165		here or or the appeal granted (0.2)

166 cl: :discharge rescinded (.)
167 ch :discharge rescinded (.) I'm obliged to (name) I haven't got the-
168 pm1 : [hohoha!
169 ch :-eh (.) the correct eh (.) discharge will be rescinded erm but
170 the certificate will be limited to obtaining (barrister's name)'s
171 further opinion (.)
172 ap :thankyou (.)
173 ch :thankyou very much goodluck (.)
174 ap :okay thankyou (0.2) that's a relief (1.8) happens to be my
175 birthday today sir it must be a good omen hhhuhhuh
176 ch : [well there you
177 are (0.6) we couldn't say more than that (.) could we except
178 happy birthday (.)
179 ap :yes thankyou (2.8)
180 ch :righhht
181 cl : [you're in for the next one too neil (.)
182 ch :what is the next one? (.)
183 cl :the next one is (appellant's name) this is this erm (.) family
184 matter where they've (.) come down from (place).....

On the completion of the decision making the clerk leaves to bring the appellant back in. This is another 'transition' or 'informal' period but no conversation is made during this period. The work of delivering the decision of the panel starts with the chair thanking the appellant for attending (line 158 and 159), adding that "it's always very good to see an appellant rather than do it on paper", to which the appellant says that they were sorry that the panel had not seen the 'bundle' of papers referred to in phase two (line 160). Here we see the attender and non-attender distinction being explicitly attended to by the participants. However, the chair cuts the appellant short, which also over-rides the issue of the lack of documentary evidence and any blame to be attached to such a situation, to inform the appellant that the panel are satisfied that the case should go back to have the counsel's opinion again, and searches for the correct term (lines 161 to 165) which the clerk then supplies the chair (line 166). The chair repeats the term, thanks the clerk, and then goes on to give the full judgement of the panel (lines 167 and 169 to 171). The appellant thanks the panel (line 172) to which the chair thanks the appellant and wishes them luck (line 173), thus bringing the case to a close. There follows a short burst of

'informal' conversation involving the appellant as the case materials are collected and the appellant leaves (lines 174 to 179), and the chair finally brings the case to a close (line 180). This 'informal talk' can be seen as indicating the end of the tribunal case, but is also a way in which the 'human side' of the law can be exhibited to the appellant.³³ After this the clerk informs the researcher that they have access to the following case (line 181), to which the chair asks which case that actually is (line 182). In responding to this request with the relevant details the next case gets under way (lines 183 and 184).

4.2d Summary.

As stated earlier this case was selected because it clearly shows the tribunal members attending to the work of a tribunal, and that the work is constituted through 'phases' of action constructed and attended to by the members themselves *in situ*.

We can summarize briefly what has occurred in the tribunal as in four phases: **Discussing the Case and Deciding on what to ask the Appellant:** the panel discussed their prior readings of the case documents, to a greater or lesser extent, and decided what issues to address to the appellant and/or their representative. **Discussing the Case with the Appellant:** the appellant was given a formal history of the case so far by the clerk, and introduced to the panel by the chair. Then a discussion of the case ensued, initially based upon the issues identified by the panel in 'phase one'. **Considering the Case and Coming to a Decision:** in the absence of the appellant they came to a decision on the merits of the case, based upon their initial perceptions of the case and the additional information presented by the appellant. They also decided on the nature of their decision, i.e. what an award would consist of, and possibly how

³³ Critiques have been made of the lack of the human face of the law in legal proceedings and how this affects appellants appreciation of their experience of justice (see the conclusion of Conley and O'Barr's (1990) 'Rules Versus Relationships: The Ethnography of Legal Discourse').

this information was to be transmitted to the appellant and/or their representative. **Delivering the Decision of the Panel to the Appellant:** the appellant returned and was given the decision by the panel. On this occasion the appellant was congratulated on the outcome of the tribunal prior to departing.

Although these 'phases' cannot be claimed to not appear here as analytic categories imposed on the data (see the post-analytic interpretation of this in the methodology), they are also clearly attended to by the participants, this is evidenced in the data via the use of transition periods (this will become even clearer throughout the following chapters especially Chapter Six). The 'phases' are 'vernacular' categories - although the descriptive term 'phase' here is mine. In each of these vernacular categories the work of the participants allows the development of the case to move to its final conclusion - a tribunal decision. In the above case the work activities of the panel was described using 'thick' or 'rich' description.³⁴ The work that occurred was unique to this case, though, as with the text-based case described earlier, there is reason to suppose that similar activities occur in other cases. Though in no two cases will the work of the tribunal be performed in the exact same manner.

It has been suggested that the 'formal' phases are brought into being by members out of more informal conversation, and are punctuated by transitional periods of informal, or less formal, discussion. As indicated, these transitional periods, e.g. the transitional period between 'phase' one and two, may be used for interaction, or may be left 'empty'.³⁵ It is possible from how I have

³⁴ Lynch notes that the term 'thick' description is usually attributed to Clifford Geertz, and that: "A 'thick' description not only is more detailed than a 'thin' one and it not only concerns what can be directly witnessed on some occasion, but it also incorporates a 'member's' localized recognition of the actions described, for example, like moves in a game, gestures rather motions, and actions within a developing colloquy" (1993 p113 footnote).

³⁵ The potential importance of periods of 'formality' and 'informality' in relation to each other is discussed by Atkinson (1982), he notes that quite different tasks are facilitated in each of these periods and warns against any evaluation of the importance of one to the exclusion of the other. The utility or otherwise of the dichotomy 'formality' and 'informality' also discussed by

described the cases to see the work of the tribunal organised into four parts or 'phases', and to equate the work of the panel with a 'formal' interaction. However, this is not an assertion I would recommend over-emphasising since there is little doubt that the action of the members in the 'informal' periods, or 'transitional periods', is/can be crucial to the work of the tribunal. The 'informal' interaction, or transitional periods, are also usually present at the beginning and end of cases and are used as a vehicle to move from one case to another.³⁶

Whilst I have stated what generally happens in various 'formal' periods of the tribunal, I do not wish to suggest that there is anything more than a general pattern, since the data from other cases indicate that the occurrences described here can be achieved in different ways. Also, the work of the 'formal' periods has been split into four headings, yet, as is illustrated in the description and analysis, each one of these involves constituent tasks which together make up the hearing. What is consistent throughout all cases covered in this research is that all parties together achieve a recognisable tribunal, even when the outcome is not satisfactory for all parties concerned.

It was noted in the previous chapter that the transition period or 'informal' talk between phases could be utilised for doing the work of deciding the case, in this instance the talk is notable for its similarity to the 'formal' talk outside the transition period. The period between the end of one phase another I have termed the 'transition period' or 'informal' talk. Discussion here may, or may not occur, further, it may or may not concern the case at hand. This period may or may not prove significant in any particular case. It is being suggested that it

Irvine (1979). She suggests that there is some utility in the terms, but that if seen in terms of Goffman's (1963:199) notion of "tightness" and "looseness", they should be considered additive rather than antithetical (Irvine 1979:786).

³⁶ Garfinkel and Sacks (1969) in their paper 'On the Formal structures of Practical Actions', note that even 'informal' or everyday language has formal structures. So when we speak of 'informality' in the thesis we do not mean that it is unstructured in terms of its formulation, but rather that it is a structured informality instead of a structured formality of legal discourse.

is 'informal' in that (a) the clerk is not present (b) talk may or may not occur, (c) talk may or may not be about the case in hand, and (d) the possibility of, and length of any talk that ensues is dependent upon how long it takes to bring the appellant from where they are waiting to the room of the tribunal. Thus, I suggest, unlike the other phases or periods of the tribunal, talk/action in this period is influenced to a degree by factors outside the control of the members themselves.

3.2f Discussion.

We have looked at two cases which, in the jargon of the members who do the work of producing legal aid tribunals, are either 'attended' or 'unattended' by appellants. Of course it must be recognised that each tribunal as an individual phenomenon is unique. Any two cases could be separated on a number of different criteria, for example, the salience of the relationship between the panel members and the Legal Aid Board, or perhaps the relationship between public servants and the public. Admittedly, the use of such dichotomies may seem to immediately separate individual instances of unique phenomena into one of two categories, and thereby providing them with definitive character in abstract terms - something which I do not think can be denied. The aim, and justification here, is that this has been done to provide the reader with an understanding of what the 'vernacular categories' that the tribunal panel members may orientate towards in their work may consist of.³⁷ The aim has been to look at the individual appeal case in the local work context in which it is situated, the term 'work' here being used with reference to the temporally contextualised practices that the individual members of the tribunal

³⁷ At this point it is worth reemphasizing Pollner (1979) who notes, while recognising the situated character of discussion and meaning, that whether or not members in a setting actually "orient to, analyze, and use the explicated meanings and structures remains problematic" (ibid:237). The orientation to presence or non-presence may be displayed by panel members but it is not as easy to claim this for appellants.

panel engage in whilst considering those individual cases within tribunal sessions.

It is appropriated to summarise some points that have arisen in the two cases, points to which we orientate to in a preliminary focus on the role of documentation in the discourse of the tribunal members.

In Case One, the unattended case, we see the clerk bringing the case to 'order' and starting the 'formal', or at least focused, discussion of the case (lines 6 and 7). This is done by stating the number of the case and the name of the appellant using the textual documentation. By doing this the clerk allows the panel to orient to the documents before them,³⁸ and also his own statement open for assessment. Further, when the clerk states the chair's name out loud, when every one present has been introduced to each other informally already, it appears to be to allow this statement to be verified, although this may be performed by inaction, or corrected before he makes a record of it in the documents. So we see the clerk using the texts to instigate some action, and then action being taken to verify information that is itself to become documented

The documentation is invoked in a different manner, and for a different purpose, when the chair states that they felt unable to comment on the medical details that had been provided for the appeals as they "seem horrendously complicated" (case two lines 24, 27, 28 and 29). This document and its details are not taken up for discussion as a 'medical report' as panel member three (line 30) states immediately subsequent to this that they have no medical report. It appears that there are medical reports and medical reports, and that the medical details in the document provided are not in a suitable form for the panel to use to make any judgement. The medical report they are invoking as absent is a

³⁸ This is similar to the attended case, case two above, where the case is also introduced by the clerk by name, but in that instance it is in response to a query by panel member as to the number of the case. In both cases reference is made to both the case number and appellants name, but the way in which this is achieved is not fixed but constructed in relation to other ongoing activities.

medical report that has been drawn up by a member of the medical profession specifically for use in legal decision making. The medical details that they have in front of them do not allow the panel to rely on them as they have not been drawn up for this purpose, and do not have the authority that such documents carry. Different documents have different legal status in the eyes of the law, and the panel wish to have documents that have the correct status, decisions based upon such documents providing a back-up to the decision makers in terms of both authority and responsibility (Raffel 1979). But the key point we should note here is that while two documents are being invoked here, one present and one absent, the second may not exist. As the chair states, the lack of the medical report document is an "unfortunate omission but perhaps there isn't one" (lines 34 and 35) - so it is an invocation of a possible document. This would seem to lend strong support for the meaning of a document to be situationally produced, as here the document has no materiality at all.

This lack of documentation does not, however, prove an insuperable obstacle, instead panel member three states that this lack of medical report allows the panel to only "talk in general terms" about the medical side of the case (lines 36 and 38). This would seem to be indicating some problem for the panel in making a decision on the case when comprehensive documentation is not available to them, but panel member three continues to say that, nevertheless, "there seemed prima facie there was a case" (line 40). This use of the term 'case' referring to an achievement of adequacy, that the case has met a standard, seemingly relating to the legal term 'prima facie case'.³⁹

In the second case, the attended case, the documents are again utilised in various fashions. As the documents which the panel members receive have a cover sheet with both a name and a case number for the session, by effectively

³⁹ A 'prima facie case' is: "A case in which there is some evidence in support of the charge or allegation made in it, and which will stand unless displaced. In a case which is being heard in court, the party starting, that is, upon whom the burden of proof rests, must make out a prima facie case, or else the other party will be able to submit that there is no case to answer, and the case will have to be dismissed" (Osborn's Concise Law Dictionary 1983:262).

reciting both name and case number the clerk allows the panel members to confirm that they have moved on to the correct case documents (lines 4 and 5). Here, I suggest we can see the focusing of members onto the specific case at hand and the documentation relevant to it, evident here in the response that the clerk receives.

We also see the documents invoked again, and in a similar fashion when the appellant appears in phase two. Here the clerk lists the documents that the panel have considered (lines 33 to 36). A list of documents are checked off by the clerk for the benefit of the appellant, however, the list is completed with the 'catch-all' "and various other papers" (line 35) - the repercussions of the 'incomplete' check list becomes clearer later. What also occurs here is that particular documents are being cited by name, and hence listed as the main documents of importance and to be discussed, while others are downgraded as belonging to "various other papers" - this list is then repeated by the chair later. The clerk also again achieves a mutual orientation by the those present after the 'transition period' and entrance of the appellant. Further, having to introduced the appellant to the case and its documents appears to bring about a structured approach to decision making.

The documents are invoked by the chair when he suggests that the appellant, in moving the appeal onwards, add to the documents verbally to which the panel will then respond (lines 51 to 53).⁴⁰ Although the appellant refuses with an apparent differing view on the barrister's opinion (document) of the case, though the nature of the problem has not yet been clarified. That a problem has arisen is taken, by the chair, to have occurred once the appellant refuses to add to the documents. The chair now has the task of clarifying just what the nature of the disagreement, or at least differing view, is, as there is a need for the appellant to add verbally to the textual documentation

⁴⁰ It is worth noting that chair's talk is punctuated by micro-pauses, and that this appears in part due to the chair flicking through documents while listing them and summarising their position. Though hearable on the tape it is not part of the transcription detail adopted here.

accompanying the case. The chair does this by getting the panel and the appellant to focus on one document, the barrister's opinion (line 60, 62 and 63), stating that it is important for them not to talk at "crossed purposes". The chair adds that the importance of this appeal is that it is on the basis of this hearing that legal aid is confirmed as being withdrawn (lines 65 and 66), but what is going on is a search for a resolution to their different stances towards the nature of the continuance of the appeal, i.e. why is the appellant appealing if they have nothing to say about the counsel's opinion.

It is interesting that the appellant does not take the opportunity to add to their case (line 54). This may be an instance of an appellant who has a good understanding of their case. It would also seem to indicate that they have a understanding of the processes of the Legal Aid Board, as rather than giving a personal account of the events about which the case is about - a frequent occurrence among appellants - they are relying on the 'correct' processing of their documentation by the Legal Aid Tribunal. In terms of the 'rules-orientated' and 'relationship-orientated' view of appellants in legal situations this is extremely rule-orientated.⁴¹ This response by the appellant also seems to affect the asymmetry of the tribunal where the panel members ask questions and the appellants respond. Although the 'question' is veiled as a request for further information, it is in effect a question nonetheless. By not responding to the request places the onus for action back in the hands of the panel. The idea of 'informal' legal processes such as many tribunals purport to be, is that the strict question and answer format of the courtroom is allowed to be relaxed. Thus allowing appellants the opportunity to expand beyond the initial question without being seen to be breaking the rules of court. It is just this 'freedom' which the appellant here declines to take up. What I suggest we can see the chair and the appellant doing here is narrowing down the focus of the discussion to the barrister's opinion (document). In doing this they end up

⁴¹ The rules-orientated and relationship-orientated continuum is a concept of categorisation of court attenders (and judges) proposed by Conley and O'Barr (1990).

focusing upon the requirement of the barrister's opinion for further evidence. The appellant then informs the panel that it has been obtained but that the barrister has not seen it. The appellant then adds that that is what they are requesting in their appeal for legal aid, that the barrister be allowed to see the additional information collected (documents) since he wrote his report (document) requesting such information (documents) be made available (lines 80 to 82). Such information (documentation) being necessary for the possibility of a successful case in court in the view of the barrister, hence the refusal to give legal aid by the Legal Aid Board until it is made available. Note that the chair and appellant are articulating copies (documents) of the same artifact, i.e. the counsel's report (document).

An aspect of interaction this chapter has discussed is the use of textual documentation,⁴² especially in relation to problem solving and surpassing conflicting understandings and impasses that arise during the cases. From the outset textual documentation is central to the processing of a tribunal case, and both cases here illustrate some of the problems that arise when such documentation is not available. Initially, in both cases the panel discuss their readings of the case file provided in advance by the Legal Aid Board. In non-attended cases the panel then move on to debating the case before coming to a decision, whereas in the attended case the appellant is allowed to discuss this documentation and provide additional documentary support. In an attended case, the panel then discuss what they have heard from the appellant and how this and any additional documentation reflects on their initial readings. They also inform the clerk of their decision, who officially records this for the legal aid board.⁴³ These official records can then be drawn up and sent to the appellant. An attending appellant or legal representative is informed about the

⁴² Such documents may sometimes include photographs, drawings and maps.

⁴³ Garfinkel's "'Good' Reasons for 'Bad' Clinic Records', discussed in the previous chapter, is worth keeping in mind here as these records will have details that can be expected to differ in focus from the activities described in this thesis.

final decision of the panel, and told that they will receive an official written record of the decision. Non-attenders receive this information from the Legal Aid Board through the mail.

Documentation not only pervades the 'formal' interaction of the tribunal, but can also be significant in the 'informal' or 'transition' phases. In the informal transition between the end of one case and start of another, documentation is used both to orient tribunal members to the case at hand, thus delineating one case from another, as well marking the official start and finish of the tribunal session. We have also seen in this chapter that one of the important roles of written documentation is to help members focus on key aspects of the case. Documents are invoked as tools for resolving disputes over meaning that occur in the discussions. The following sections will focus on attended cases and elaborate further on various practices.

4.3 Other Activities in the Four Phases.

When we look at data⁴⁴ from other cases we see that while the tribunals can be seen to develop and be attended to by the tribunal member in line with the previously described four phase 'model', actual situated practices are not determined in advance. The course of action the tribunal members take is instead being locally determined and hearably so. In the following section we will look at a number of cases which display some of the situated activities that tribunal members have been recorded as engaged in which display the very locally situatedness of the Legal Aid Tribunal.

⁴⁴ Here we will be looking only at segments from cases, however, Appendix Three contains the larger transcripts from which these segments have been taken followed by a description of that transcript. Where a transcript does not begin at the beginning of a case a brief summary of the activities preceding the start of the transcript is provided.

- 7 pm2 :my comment about this I made uhh (.) a bit outside my field (.)
8 was about adoption (0.4)
9 pm1 :there's a possibility that they'll go that route isn't there (.)
10 pm3 :very rarely now
11 all : [(unclear as all talk at once)
12 pm3 :it's very rarely (.) they go through that route to be (unclear) (.)
13 children act would (.)
14 ? :mmmmh
15 ch :yes (.) children yep (.) that would be exceptional (.)
16 pm3 :if it's it' right that he can't (.) sort the (unclear) to qualify or
17 getting a grant or resposibilty order because he's erm (.)
18 (remarried) father of the child (.) erm (unclear)
19 pm1 :what's (unclear) like (0.2)
20 ch :sorry (.)

It is not necessarily the case that all the panel members are necessarily clear on the relevant law to any case they may be considering. Even if they are aware of the statute it does not mean that they are aware of how they transpose themselves into actual practice in the real world. This is illustrated in phase one of case three where following the suggestion about adoption being an issue by panel member two (lines 7 and 8), panel member two suggests that that that was likely (line 9). However, this understanding of the current practices is contradicted by both panel member three (lines 10, 12 and 13) and the chair (line 15).

Case Four.⁴⁶ (Venue - See Appendix One Venue Three.)

The stance taken towards a case can be phrased in terms of its inherent qualities, or extraneous circumstances, but it not is the case that discussion points revolve solely around statutory aspects of the law. The personal and anecdotal opinions of the panel towards the law are also brought into the

⁴⁵ Data session nine tape one case three.

⁴⁶ Data session eight tape one case one.

discussion of cases.

19 ch :there are a lot of these cases going through (.) err the courts now
20 (.) one sees them (.) all the time in (place name) at any rate (.)
21 where fathers who have absolutely hopeless cases (.)
22 pm3 :ummm (.)
23 ch :eh pursue them with legal aid and the local authority (.) and the
24 guardian err defend at immense public expense (.)
25 all :ummmh (.)
26 ch :an the judges complain all the time that legal aid shouldn't be
27 granted (.)
28 pm3 :yep (0.4) yes and the problem is you you once you open the door
29 a lot of people are going to go through it all with legal aid
30 certificates

Here in case Four we see the initial attitude towards the case taken by some of the panel members being made in terms of larger socio-economic framework of the law.

This does not mean that the panel members do not go on to frame the case with an understanding and awareness of their own biases. Further in the same case, after a negative appraisal of the situation at a 'personal level' the merits of the case are noted.

75 pm3 :he's now living in a probation hostel (4.0)
76 ? :what is (treatment)
77 pm1 : [treated by a psychologist I mean how permanent is
78 such treatment likely to prove I mean (.) is he still is it on going
79 I mean (.)
80 ch :well he hasn't done any naughties to any boys (0.2) heh heh he's
81 quite normal in that respect (.)
82 ? :hmmmmh well (.)
83 ch :it's only with (names) that he's been errm (.) interfering (.)
84 pm1 :mmm (1.0) I'd love to know how old (names) are (.) and if they
85 are teenagers (0.4) it might influence one's decisions to the the risk
86 (0.2)
87 pm2 :well let's see what he has to say to me (.) I mean I must say I
88 don't have a lot of sympathy but (unclear)
89 pm1 : [I start from I start from the
90 same (.) ground but (.)
91 pm2 :the work here (.) justifies the investigation (3.0)

But this awareness of the merits of the case is still tempered by the perceived practicalities of the implementation of that law.

92 ch :seems to me its going to take awful lot more (.) a lot of legal aid
93 money (unclear) (.)
94 all :(unclear)
95 ch :and cause enormous pain and upset to the children and the
96 mothers (.)
97 pm1 :and if the mothers absolutely determined that he won't have it
98 anyway (.) effectively she will stop him I mean she will just say
99 I am not doing it and the court can do what it likes (.) the court
100 is not going to take the children away from her (.) because it
101 won't let her have contact with the step father (.) so eh
102 pm3 : [couldn't
103 really blame the mother for taking that action either
104 pm1 : [no I beg your
105 pardon (.) father I'm sorry father (.) not step-father (.)
106 ch :children going to (.) horrible (that's right)
107 pm1 :and if the boys are living with the girls in question (.) which they
108 are according to that (.) going to upset the whole family unit
109 (0.2) I'm very (.) very

It can be the case that the panel are not sure of their exact role with regards to assessing a case.

109 pm1 :(0.2) I'm very (.) very
110 pm2 : [well well I (.) suppose we take all this
111 into account see what we act (unclear)
112 pm3 : [see what he sez see what he sez (.)
113 pm2 :I'm not sure whether that' enough to deny him the question (.)
114 ? :hmmm
115 pm1 : [that's the problem isn't we are in a sense putting ourselves
116 in the position of (.) errm
117 ? : [judging
118 pm1 : [judging the case almost (2.0)
119 ch :I suppose we have to do that to some extent
120 ? : [hmmm (.)
121 pm3 :well when you are rationing money (.)
122 ch :yes (1.6)
123 cl :shall I ask (unclear) (.)
124 ch :yes please (.) thank you (name of clerk)
125 cl :(unclear)
126 ch :sorry about that (1.0) hello (name of appellant)

Finally it is interesting that the chair believes that it is part of their job to ration the monies of the Legal Aid Board as this is not in fact the case, and no mention of rationing is made in the Legal Aid Handbook 1994. Rather, if the case warrants it, it receives legal aid irrespective of issues of how much money the Legal Aid Board's budget has.

Case Five.⁴⁷ (Venue - See Appendix One Venue Number Two.)

As we will discuss in Chapter Six the use of textual documentation is often central to the discussion of a case, however it is often the case that the panel members are not impressed with the presentation of the case to appeal and this was often overtly referred to.

18 ch :-are very serious matters actually (0.2) erm my own (0.2) I made
19 these reservations (.) to us here (.) my own reservations is that this
20 is again (.) a very poorly presented (.) application a very poorly
21 presented appeal I mean it is all very well to (.) err refer to the act
22 but act actually doesn't help you (0.2) you need to go a whole lot
23 further into it (.) I mean to point to section two six of the further
24 education act (.) made it plain (0.2) well it doesn't make it plain
25 at all actually but there we are (.) I mean (3.0)

The chair states that the case has been poorly presented (as he believes were earlier cases in the session⁴⁸), specifying the inadequacy of a reference in the documentation to a specific act of parliament on education.⁴⁹ However,

⁴⁷ Data session nine tape two case one.

⁴⁸ This illustrates that even the presentation of the whole of a case will not necessarily provide contextual background to the reader of some of the issues raised by the member. Of course the provision of a whole tribunal session is not going to guarantee this either.

⁴⁹ Precedent being "A judgement of decision of a court of law cited as an authority for deciding a similar set of facts; a case which serves as an authority for the legal principle embodied in its decision" (Osborn's Concise Law

rarely does this prevent the panel from coming to some sort of decision on the case itself, although it is without doubt that in such instances the presence of the appellant or a representative can help in making that decision a granting of the appeal rather than its refusal. As we see later on in the case this because the, in this instance the legal representative can situationally attend to any perceived deficiencies in the material presentation of the case and give an account of why they should not influence a positive decision on the case.

471 s :errm is there anything else that we've (0.8) it's a matter of
 472 judgement on this point but (.) our (.) original application was
 473 ruled out on the basis (0.2) that we didn't have a case (0.2) I (.)
 474 think that one (.) has got to take (.) a view of the way that
 475 proceedings can be dealt with in this sort of tribunal which is an
 476 appeal tribunal (.) this isn't a review of a judicial review
 477 application (0.2) and I have not prepared it on the basis that we're
 478 going before the court on a (.) a full hearing (.) this is a hearing
 479 to establish whether we should have legal aid (.) there may be (.)
 480 deficiencies in my arguments today through lack of preparation
 481 because (.) of the nature of today's proceedings is with regard to
 482 whether we should get legal aid (.) I would say that on the basis
 483 of what we have put before the tribunal today (.) I think that
 484 we've established that we've got something substantial to argue
 485 about (.) and I think at the very least (.) it merits a decision (.) to
 486 obtain counsel's opinion (.) at the very least (0.2)
 487 c :okay (.) fine (.) thankyou (3.0) if you would like to wait outside
 488 (23.0)

In this instance we see the appellant's solicitor using the opportunity afforded by the summing-up of the case to give just such an account of any perceived difficulties.

Case Six.⁵⁰ (Venue - See Appendix One Venue Number Four.)

The activities that occur in the latter part of a tribunal case hearing are,

Dictionary 1983:259).

⁵⁰ Data session 10 tape 1 case 1.

of course, directly related to the activities that have occurred in its previous 'phases'. Although when making a decision on a case the panel may look at the case not just in some narrow sense but often considering other alternatives and possibilities

- 8 pm2 :-forthcoming yuh err mister (solicitor's name) there indicates that
 9 he had a letter inviting him to consider quantum all he has to do
 10 now is contact them and consider quantum (0.2) and if an offer is-?
 11 : [mmm mmm
 12 pm2 :-forthcoming that is satisfactory he can settle it without (.) legal
 13 aid (.) I don't think a fee paying client of moderate means would
 14 embark upon (.) this sort of expensive litigation (.) just for the
 15 sake of ff a few hundred pounds (0.6)
 16 ch :okay (.)
 17 pm1 :I agree with that (.)
 18 pm2 :it doesn't stop (solicitors first name) from reapplying at a later
 19 date does it (unclear) (.)
 20 ch :no (2.0) nyeh okay fine then (.)

What this also illustrates is that, even after the appellant or their representative has discussed the case with the panel members, this does not mean that the panel members have all come to a similar understanding about the documents and the case. Instead, we can see that the panel members have interpreted the case differently. It takes further discussion between them to agree upon an interpretation in terms of the 'correct' award, but a 'correct' award based upon the understanding that a reapplication is possible - an aspect which is not necessarily part of any formally defined decision making guidelines in the Legal Aid Handbook.

Case Seven.⁵¹ (Venue - Appendix One Venue Number Four.)

Another case illustrates further the role of 'other' considerations in decision making by the tribunal panel, in this instance for in the justification of

⁵¹ Data session 5 tape 1 case 1.

awarding monies to a borderline case

19 ch :seems to me that (.) erh (.) its a (.) fairly good (0.2) good claim
20 that she's got (.) and I (0.2) you won't get an opinion better than
21 (barrister's?) letter will you (.)
22 ? :(unclear)
23 pm1 : [there has been some more recent cases hasn't there
24 pm3 : [well there's (.)
25 nineteen seventy one (.)
26 ch :there are a lot of cases (.) err
27 pm1 : [yes there are (6.0)
28 pm2 :it's obviously not a very big case anyway and it may be th that if
29 if it (.) it might even be a case of (0.2) the insurance company
30 could be persuaded to settle before er (.) proceedings have
31 started
32 ch : [ummh (4.0)
33 cl :right I'll bring her back then (.)
34 ch :mmm (16.0)

What is also of interest here is that, though there does appear to be unanimous agreement as to the success of the appeal, no firm decision as to the nature of the award seems to be overtly agreed upon and yet the clerk perceives this 'phase' of the case to be finished and is not argued against or contradicted. This would appear to be an incomplete decision making process in an explicit sense, yet it succeeds unproblematically for the participants as a completed 'phase', and as such is another example of the situational based nature of what constitutes a 'phase'.

4.4 Foreshortened Case Hearings.

The three cases described in this section display that the work that legal aid tribunal engage in, and described so far with reference to four 'phases', does not necessarily occur in a manner easily described with reference to such a pattern or 'analytic tool'. Instead these three cases move through the tribunal process without following the 'pattern' which the other cases that we have looked at appear to do. Two of the three cases described do display an overt

reference to the fact that they are foreshortening the 'usual' tribunal process, and as such might be seen to be the exceptions that prove the rule. However, the third case does not show the panel members displaying any reference to the 'four phase' model that has guided the presentation in this thesis. Because of the image of the four 'phases' built up over the thesis via the previous cases the reader's eye searches for the four phases but, I contend, this due to the context in which this case is displayed here rather than any activity displayed in the case itself.

Although the 'four phase' model is not intended as a theoretical framework imposed on the data in this thesis, and is a model which the members themselves can be seen to be attentive, its use as an aid to description has to be treated with some caution. An aim of this section is to highlight this point, emphasizing that it has not been intended as a determining entity independent of the singular occasions in which it is manifested. The following three cases will illustrate this point, as descriptions of practices whose uniqueness can not be encapsulated via reference to a determinative model, a point which is of course central to the ethnomethodological position used to guide this thesis.

Case Eight.⁵² (Venue - See Appendix One Venue Number Two.)

The transcript starts at the beginning of the case recording.

1	ch	:is she coming? (.)
2	cl	:she's here (.)
3	ch	:is is she coming in? (.)
4	cl	:err yeah well yeah I I are you happy to (0.2)
5	pm?	: [are we
6	ch	:no (.) no no no no hang on a minute (.)
7	pm?	: [unclear
8	cl	:no she's not much (unclear) you know
9	ch	: [okay (unclear) well (0.2)

⁵² Data session nine tape two case 2 (5).

10 fine (unclear) (.)
 11 pm1 :I think we all have the view that if (.) if the other side's got
 12 ch : [have (name) [have
 13 (name) got legal aid? (.)
 14 cl :let me just check (0.2)
 15 pm2 :she sez so
 16 pm1 : [she sez he has (11.0)
 17 cl :yep he has (0.4) area six (0.2)
 18 ch :then arguably then she must have it (.) because (.) ermm it its-
 19 pm? : [mmm
 20 ch :-quite unfair but (.) but I mean we must be even handed (0.6) I-
 21 pm? : [mmm
 22 ch :-mean (.) you know (.) its
 23 pm2 : [can we discharge his (.)
 24 ch :no (.)
 25 ? :yeah (laugh)
 26 cl :well you we we could certainly be putting her under (.) future
 27 legal aid for the two of then could be considered (0.2) errm (0.2)
 28 pm3 :if he's got it she that's fine (.) but if (unclear) (0.2)
 29 ? : [ummm
 30 cl :mind sometimes it works out that they both have it for a short
 31 time then you knock them both on the head (.)
 32 ? :hummm (.)
 33 cl :cause err its (.) you just simply can just get into a lawyers benefit
 34 and that (.)
 35 ch :well I think so (.) I think so (.) I mean (1.0) arguing about the-
 36 ? : [mmm
 37 ch :(.) mahogany box room fitting (.) clearly the pull string handle (.)
 38 pm1 : [ssssuh
 39 pm3 :it'll be subject to statutory charge (0.4)
 40 ? :(unclear) the toilet seat
 41 pm1 : [(laughs)
 42 ch : [(laughs) (0.4) righto (.) well I'm (.)
 43 what's the situation then in this case (.)
 44 cl :right well have ermm
 45 ch : [no hang on (mrs name of appellant miss
 46 name of appellant) she's here? (.)
 47 cl :she's here (.)
 48 ch :she's er he
 49 pm2 : [he has legal aid (.)
 50 cl :he has legal aid (.)
 51 ch :well I think we will forward her and advance her (.) her appeal- cl
 52 : [right
 53 ch :(.) err on the basis of our (unclear)
 54 cl : [yep (.) these are the other
 55 attenders (.).

56 ch :right (unclear) (15.0)
 57 clerk leaves to get appellant, some unclear talk in the transition
 58 period then the appellant arrives.

Here we see early agreement that the case should be awarded legal aid, although there is some preference shown for both appellant and plaintiff to have their legal aid revoked. This is not a current option though, and some talk about when this may be an option is undertaken. The notable point in this case is that the decision to tell the appellant that they have decided to allow the appeal is taken in 'phase one'. Also noticeable is that the chair started off by attempting to move 'phase two' of the appeal before completing a 'phase one' (line 3). This caused the clerk to question this action, causing him to become a bit flustered (line 4), and illustrates that the clerk is attending to the 'normal' 'phases' of the tribunal. It seems likely that one of the panel members has also noticed this 'deviation from the norm' (lines 5 and 7). This concern for the deviation from the 'norm' at the beginning of 'phase one', and the lack of concern for the suggested 'deviation' at the end of 'phase one', would seem to be due to the fact that the work necessary for the move had not been done in the first instance, whereas it had in the second.

The Second Phase of Case Eight - The Delivery of the Decision.

59 ch :(name of attender) I won't bother (name) our clerk should read
 60 any of the notes (.) I would just say and I won't even introduce us
 61 (.) ermm we have read these papers (.) over the last few days (.)
 62 we have observed in your comments that (name of opposite party
 63 in case) has legal aid (.) we have confirmed with (name) our clerk
 64 he does have legal aid and in those circumstances we will grant
 65 your appeal so that you may have legal aid (.) I have to say
 66 though that that is no guarantee that you will get legal aid
 67 throughout the proceedings (.)
 68 ap :I realise that (.)
 69 ch :right (.) good (.) okay (.) so there we are thank you for coming
 70 (.)
 71 ap :well thank you very much for (unclear)
 72 ch : [no my pleasure (.)
 73 ap :thankyou (0.2) bye bye (.)

74 cl :bye
75 ch : [goodbye (5.6)
76 Appellant leaves
77 ch :that was good and quick (1.6) now (name of next case)

The appellant arrives and the chair addresses her by name and tells her that he will not bother to introduce himself or the panel, that they have considered the appeal documents and the fact that her ex-partner has legal aid (lines 59 to 63). The chair then states that this has been confirmed by the clerk and hence they will grant the appeal (lines 63 to 65), adding the caution that this is not a guarantee of continued legal aid support (lines 65 to 67). Here we see the chair divert from the 'normal' tendency to introduce themselves, the clerk and the panel at 'phase two'. The reference to the documents and the actions of the panel so far are features of 'phase two' but this is transformed into a decision via reference to confirmation of details by the clerk, which is a reference to their discussion in the previous 'phase', and the delivery of a 'granting the appeal' with reference to its possibly being temporary.

In this case we see the panel come to a decision the initial phase of the tribunal which they consider satisfactory, although a final decision is not usually an outcome of phase one but phase three, they then carry the 'logic' of this through by suggesting they inform the appellant of their decision. The second phase begins with references to the 'normal' practices of phase two, giving proof of the 'normative' way in which they are adhered to - at least in this case, with an explanation of why they are being deviated from. This explanation then develops into a delivery of a decision which would have 'normally' occurred in phase four.

What we can also see from this case is that the work that is normally performed across four phases is achieved in two. Though it must be noted that these two phases cannot therefore be seen as examples of any of the phases noted in the description of other cases in this thesis. Nevertheless, we can note the overt references by the clerk and the panel members to 'normal' practices and deviation occurring, though it must be remembered that this is itself a

situated construction of normative procedure.

Finally we have seen that it is possible to forward the tribunal 'phases', but that this can meet with resistance if the work which the panel is meant to do has not been achieved, or is no longer necessary. The panel were aware in this case when the chair asked initially if the appellant was coming in, that the work of the panel had not been done for them to satisfactorily move to the next 'phase'. This attention to the work that needs to be done before 'moving on' is displayed both by the clerk and one of the panel members. When the chair suggests forwarding the case to phase four there are no objections, this would seem to be because the clerk and the panel members realised that they have done the work which would allow this to be possible.

Case Nine.⁵³ (Venue - See Appendix One Venue Number Three.)

We join this case in the 'transition period' between 'phase one' and 'phase two'.

- 65 Clerk leaves to get attender
66 ch :so we're just going to tell him (.)
67 pm2 :mmm (.)
68 pm1 :if you're happy to (laugh) (0.4)
69 pm2 :what the upshot (unclear) try and persuade us that he he's
70 (unclear) but I don't suppose for a minute will (.) do anything
71 other than the great (unclear)
72 ? : [(laugh)
73 Some unclear talk ensues at a rapid pace then a pause (2.0)
74 pm1 :wh wh what financial limits are we going to set (.) what do you
75 think seven fifty (.)
76 ? :okay (.)
77 pm3 :yeah inclusive oh inclusive oh yeas (.)
78 ch :ahem (.)
79 [unclear comment made as clerk returns with the appellant]

We see here the transition period being used to perform work that was

⁵³ Data session four tape two case 2 (2).

not finished before the clerk went to fetch the appellant. That work being what the panel are going to say to the appellant. Although the panel has not discussed the next piece of work the chair suggests that they inform the appellant of their decision, this can be seen as a deviation from the 'normal' pattern of work when an appellant is in attendance, in that they would 'normally' talk the case over with the appellant then discuss again their decision on the case and then inform the appellant (see previous sections of this chapter). However, in such a 'normal' case they would have decided on some issue which they wished to discuss with the appellant which they have not done in this case, rather they have already come to a unanimous decision in favour of the appellants claim. The chair seems to acknowledge this deviation from the 'norm' in the suggestion that they just "tell him" (line 66), and seems to be recognised as such by panel member one when they respond with "if you're happy to" (line 68). The rest of the panel also give assent to this proposed course of action.

It is notable that panel member one raises as an issue the nature of the award they are to give the appellant (lines 74 and 75). This is interesting in that the panel managed this piece of work earlier and to the agreement of all the panel. It seems possible that this resurfacing of the question of the amount of the award is raised again due to the departure from 'normal' procedure, procedure which, after discussion with the appellant, raises again for discussion the nature of the award to the appellant.

In this case it is possible that the move to the delivery of the decision was influenced not only by a decision having been made on the case, but also due to no decision having been made as to what to ask the appellant. Once the panel end phase one and enter the transition period between phases the chair realises this and suggests the foreshortening of the case. Even though a decision had been agreed on the case the panel had not agreed to foreshorten the 'normal' process, this seems to be support by the fact that once it is suggested the panel member once again agree the award with each other, an occurrence that seems to be in response to the newly agreed foreshortening.

Although direct reference is made to the change in practice from

'normal' procedure does make reference to this deviation in the transition period, the four phases do not adequately describe this adaptation of the transition period into the final decision-making occasion.

Case Ten.⁵⁴

(Venue - Appendix One Venue Number Three.)

We join this case in the middle of a discussion of the case by the panel with the appellant in 'phase two'.⁵⁵

- 1 ch : [well it does sound strange but there's no
2 there's no letter from mister (solicitor's name) err (.) suggesting
3 that (.) the opinion given is different to the one given in
4 conference (.) and I'm afraid given the err the opinion we have
5 now (.) that we have no alternative (.) mister (appellants name) but
6 to say that we must dismiss your appeal (0.2) if you want to go
7 back and talk to mister (solicitor's name) about it he will advise
8 you as to what you might be able to do next (.) errah but given the
9 (0.2) the advice (.) in writing from mister (name) of counsel (0.2)
10 which puts your chances at under fifty per cent (.) errm (0.4) then
11 we have ah (.) no alternative in the present circumstances I'm
12 affraid but to dismiss that appeal (0.6)
13 ap :so (0.2) don't a (0.2) so (1.2)
14 ch :what happens now well you go back and discuss with mister
15 (solicitor's name) what happens now I think is the answer (1.0)
16 ap :yeah but (.) like a say I mean you're dismissing it on the (0.8)
17 grounds of what the barrister said (0.4) and a've come to appeal -
18 ch : [ummm a p
19 :-so (2.0) that's not much of appeal (0.6) because like (0.4) you- ch
20 : [umm
21 ap :-know what he sez in the first place I know what he sez
22 ch : [no (.)
23 we only know that he said forty per cent to you in conference and
24 fifty in his written und erh less than fifty per cent in his written
25 advice that's all we know on that (0.4) you're telling us he said
26 fifty per cent in conference (.)
27 ap :quoted fifty per cent und then he said forty
28 ch : [well (0.2) we can't go behind that (.)

⁵⁴ Data session four tape two case 4 (5).

⁵⁵ See Appendix Three for a summary of the case so far.

29 you go back and discuss it with mister (solicitor's name) mister
 30 (solicitor's name) may advise you as to what might be able
 31 to do (.) in terms of perhaps getting another opinion from a
 32 different barrister (.) which might leave you in a position to make
 33 a fresh application for legal aid (.) but (0.2) that would have to be
 34 a very strong opinion I think to get over (slight laugh) this one
 35 (0.2) but we are left with this opinion now (1.6) what we are
 36 saying is as I said to you at the beginning of this hearing we are
 37 not here to try the case we are not the judge (.) I know you say "I
 38 don't agree with it" but we cannot we have to accept the advice
 39 that you have been given by your barrister (.) he's acting on your
 40 side (.) and the advice he's given is that it's less than fifty per cent
 41 (.) and we are not here on this appeal to say well let's make our
 42 own minds up on what your chances are (3.0) we're here to say
 43 (.) we've seen the facts there is no evidence the barrister was (.)
 44 totally misdirected himself (.) and therefore we must we must
 45 accept his assessment (3.0) right (.) so that's it I'm afraid the
 46 appeal is dismissed and I suggest you go back to you solicitor
 47 mister (name) and discuss with him what happens now (1.4)
 48 ap :right then (.)
 49 ch :thank you
 50 cl : [thankyou
 51 ap : [okay then cheers (.)
 52 ch :bye bye
 53 cl : [thanks bye (6.0)
 54 ch :pffhhhh (.)
 55 cl :next one is mister (appellants name)

This case is an appeal which in 'phase one' the panel are agreed upon
 the interpretation of the case documents which they had received prior to the
 tribunal. That they indicated that the case should be refused legal aid and that
 this opinion meant the appeal should be refused as it stood at that point in time.
 However, since the appellant can introduce new material at the tribunal, and
 they can not refuse the appeal without checking this, they move on to 'phase
 two' to discuss the case with the appellant. However, in 'phase two' it becomes
 evident to the panel that the appellant does not have any new material to present
 before the tribunal. Once the chair has established this he can be seen to
 develop the discussion with the appellant, informing the appellant that the panel
 are not able to grant the appeal against the refusal of legal aid and in so doing
 delivers the decision of the panel as being such. The chair does this without

moving the tribunal to 'phase three', the reason that the chair can do this is because it was established that the case warranted a refusal unless new material was made available, and since it has not been the chair can presumably assume the panel's opinion on the case. The appellant has raised some issues about the case with the panel but these have not affected the key point of the appellants own barrister's opinion which is unfavourable towards the appellant. As none of the panel has taken the appellant's information to override their initial view, by raising this in the discussion with the appellant, the chair assumes previous position of the panel and informs the appellant of the refusal without proceeding to 'phase three'. The chair does this, and in doing so differs from the two previous examples of foreshortening, without conferring with the other panel members. This case also differs in that not overt reference is made to the 'four phase' 'norm', by the panel members or the clerk. Even if the panel get through the work that is associated with the four phases that have been described throughout this thesis as evident in other cases, this does not mean that the panel have been attending to the four phases in a way that describing their activities with reference to such a model would not be a distortion.

It is notable that in this case the panel are not allowing any testimony of the appellant to allow an amendment to the situation depicted in the documentation. The barrister's report as a document is being accorded a status that is not necessarily accorded to other documentation, in that its content is being taken as unambiguous. This would seem to indicate that all documents are not accorded the same status as representations of external situations, this does not necessary mean that they are better representations, but that they are accorded institutionalised legitimacy, that causes their contents to be accorded a much narrower negotiable meaning. A meaning that is designed to be referred to in specific bureaucratic processes and practices. Although the relevance of the document and its content still require situated negotiation and application. This case displays what appears as a phase two initially to be transformed due to situational circumstance to be transformed, not into a phase four, but into something that is neither.

4.4a Critique of Four Phases.

What we have seen in the three previous examples, is that the tribunal does not necessarily always move through the 'four phases' that were evident in the descriptions the previous cases of legal aid appeals tribunals in this thesis. Also, we have seen that when foreshortening of the 'typical' procedure does occur, it does not necessarily occur at the same time or at the same place illustrating that the tribunal panel do the work of deciding an appeal with some considerable flexibility of process. This flexibility would seem to revolve around the specific requirements of individual cases and the approach that the panel adopts towards their assessment. The specific approach is not taken from a set of fixed options at the beginning of each case tribunal, but rather develops from the interactions of the panel members, clerk and appellant. Nevertheless it all seems to be recognisable and acceptable, at least to the panel members if not all the appellants,⁵⁶ as being successful instance of legal aid tribunals.

What seems to be a requirement of the foreshortening of the 'normal' tribunal process, is that the work which is typically performed in the 'phases' to be 'passed over', has either been performed already or is not applicable to that particular case. Although the work necessary to assess a particular case is not fixed in advance, but is instead a result of the developing interaction of those involved. The three examples of foreshortening described here, are not meant to be 'typical', or the only variations that are available, instead they are just illustrations of individual unique instances in the data of this thesis. Also, what the third example of the foreshortened case displays, is that foreshortening is not restricted to cases which involve the granting of legal aid. Hence, foreshortening can not be explained by such typification as assuming that it is the positive nature of their decision which allows the panel to deviate from their 'typical' procedure.

⁵⁶ There were occasions when appellant's have been 'upset' with the panel, their decision and legal aid system they are perceived to represent, resulting in abusive behaviour by the appellants.

4.5 Descriptive Categories in Description

In this section we will look briefly at a study of rule-following in administrative bureaucracy by Zimmerman (1971) in which the focus of explanation is given as being necessarily focused on explanations of situated activity. Following this it will be suggested that a more abstract description of activities, here derive by me from the work of Lynch (1982) can be informative and explanatory, but it should not be seems as foundational and must be directly related to situated activity.

4.5a Zimmerman on Rule Following.

The issue of 'administrative rationality', the extent to which personnel adhere to the letter or at least intent of formal organizational rules of conduct has been investigated ethnomethodologically most notably by Zimmerman (1971). Zimmerman notes that the numerous studies of bureaucrats have shown them adhering to set operational guidelines, but in doing so have tended to fail to look at actual occasions of rule following. He notes as a consequence of this:

"For the investigator to make decisions about rules without clarifying the basis of such decisions - particularly without reference to how personnel make such decisions - invites the treatment of rules as idealizations, possessing stable operational meaning invariant to the exigencies of actual situations of use, and from the practical interests, perspective, and interpretive practices of the rule user." (ibid p223)

Zimmerman takes the view that investigations need to look at how rules are implemented in practice and suggests that "the operational import of formal rules and organizational policy is decided by personnel on a case-by-case basis warranted on reasonable 'grounds'." (ibid p225).

Reporting on an investigation of a Metropolitan County Bureau of Public Assistance reception desk's application of organizational rules and policies, he first notes that looking at the practices as a set of steps is misguided

if it is taken from the perspective of the applicant since for the receptionist applying the institutional rules the perspective is different. Rather, for the receptionist instead of a series of steps in a process, as it is for the applicant, the receptionist instead of being concerned with steps is concerned with practicalities of matching the pace of work with demands in a busy office where multiple activities taking place. The result of which is that the production of a step-like appearance in the processing of cases, is not due to a concern with steps per se, but with 'timing and scheduling' as critical features of task completion. Hence Zimmerman notes that the processing of a case gains "its temporal specification by reference to the press of demands and available resources at the time." (ibid p229) By this Zimmerman does not mean that the activities are rule governed in some fashion, but that these rules may not be either exactly those of the organization nor those of a theoretical analyst.

Zimmerman investigates these practices on occasions of the use of 'short cuts' in processes due to the disruption of the 'system' by 'problem cases'. In terms of this studies relation to this thesis that Zimmerman is concerned with the ordering of cases in a process rather than the work of deciding those cases. Rather than looking at the work of the interviewer his concern is with the activities of the secretary in delegating the work of others, not on case decision-making as such.

Zimmerman does not suggest that the organisational rules are not adequate most of the time, but he suggests that "what the rule is intended to provide for is discovered in the course of employing it over a number of situations" and that it is when things go wrong that what the rule intended 'all along'. It is action as a result of recognising what the rule intended that interests Zimmerman who suggests that:

"action-inaccord-with-a-rule is not a matter of compliance or non-compliance per se but the use of various ways in which persons *satisfy* themselves and others and others concerning what is or is not 'reasonable' compliance in particular situations." (ibid:233)

What I suggest we can see in our processing of cases by decision-makers i.e. tribunal panel members, in Legal Aid Tribunals is activity that relates to 'what the rule intends'. This is in contrast to seeing it as some sort of transcendental rule breaking or theorised activity pronouncing an invalidity of such decision-making activity. As Zimmerman concludes that:

"The use of formally prescribed procedures viewed from the perspective of the notion of their 'competent use' thus becomes matters not of compliance or deviance but of judgemental work providing for the reasonableness of viewing particular actions as essentially satisfying the provisions of the rule, even though the action may contrast with invocable precedent, with members' idealized versions of what kinds of acts are called for by the rule, or with sociologists' ideas concerning the behavioural acts prescribed or proscribed by the rule." (ibid:237-238)

Thus Zimmerman illuminates not only the reasons for deviations from 'normal' procedure in Legal Aid Tribunals, but confirms the caution that needs to be adopted when imposing a generalising model instead of concern for the uniqueness of situated activity. For the production of such transsituational categories and descriptions, as Wieder (1971) explains in his critique of semantics in 'On Meaning by Rule' is abandoned by ethnomethodology as a goal and becomes instead a topic. When descriptive categories are used they should not be adopted as some form of foundational descriptive version of events.

4.5b Monological and Dialogical Presentations.

If we return to Section Two we can see that the panel members attended to individual tribunals as either 'attended' and 'non-attended', whilst these are glosses for individually situated cases, by exploring these I suggest we will clarify some aspects of document use that will help inform some of the practices we will investigate in the following chapter's re-specification of legal positivist decision-making.

Michael Lynch (1982) notes that arguments can be either monological,

where a speech is a constructed argument, or dialogical, where speech is seen as being 'in' an argument. Lynch goes on to use this distinction to talk of 'Argument' (dialogical) and 'argument' (monological), where the former consists of a social interaction "produced through the interrelated activities of two or more parties in dialogue." The latter consists of a more classic form of speech "delivered by one party to another party or parties" (ibid:287).⁵⁷

What I suggest below is that the non-attended case and the attended case can be seen as monological and dialogical respectively. By this it is meant that the discourse in a non-attended case concerns a written appeal, a monological text. By contrast, the discourse produced in an attended case is 'in-argument', in a dialogue between the appellant and panel. In an attended case the appellant is also required to submit a monological argument, and dialogical argument between panel members may occur in unattended cases, but the distinction does apply to the appellant's part in the tribunal. The appellant has the option to pursue either or both monological and dialogical argument if they attend the case hearing. If the appellant does not attend the case hearing, then they only take the option of a monological presentation.

What I hope to illustrate below is that this distinction is consequential, not necessarily in the out-come of the case hearing, but in the case evaluation i.e. the situated practices.

The distinction between monological and dialogical argument describes two options for Legal Aid appeals tribunals: those at which the appellant is absent and the panel members work only from the texts they have in front of them, and those at which the appellant or their legal representative attends the tribunal. If we contrast the two cases presented in Section Two we can focus upon the consequences of the presence of an appellant. In the first case, a problem arose over a medical report that a panel member said was submitted

⁵⁷ Lynch footnotes that his use of monological and dialogical is not based upon Habermasian universals in idealised speaking situations, but, following Harvey Sacks, "*sequences of utterances by different speakers in actual (recorded) interactions*" (Lynch 1982:287 *footnote*).

when the initial legal aid application was made (case one lines 30 and 33). The chair states that it would be unfortunate if such a report had not been included, but then considers that one may not have been made (case one lines 34 and 35). This incident highlights the limits of the monological case: the fact that information is lacking or not clear from the documents, and cannot be checked with the appellant. This contrasts with the dialogical case (case two) in which the appellant is given a 'check-list' (lines 39 to 49) of documents the panel have read, and is able to note any omissions.

As illustrated in case one when the chair states that they felt unable to comment on the medical details because they "seem horrendously complicated" (case one lines 24, 27 and 28), the monological case presentation limits the ability of the panel to clarify aspects of the case. The panel are forced to speculate or ignore aspects which cannot be clearly understood from the documents. In the dialogical case speculation is done in the presence of the appellant, whose immediate responses provide the panel members with an additional resource for clarifying problematic aspects of the case. In fact, as we saw in case two the appellant may be brought into the tribunal process very early when the panel raise an issue that they believe the appellant can clarify.

The two cases involve different uses of documentary evidence. In case one, the chair states that the absence of the medical report is an "unfortunate omission but perhaps there isn't one" (lines 34 and 35). This uncertainty about the existence of documentation is not without some foundation. In contrast the appellant in case two was able to inform the panel that documents which were not presently at hand had been provided. The absence of the appellant in case one did not allow the panel to pursue the notable absence.

A limit of the monological option is that the panel only have recourse to the documents provided by the Legal Aid Board. These include records provided by the appellant, but any dialogical input on behalf of the appellant can only be submitted by the panel themselves. In case one this did not prove fatal for the appellant, but it might have been troublesome if the appellant in case two had relied upon a monologic approach and thus had been unable to

inform the panel that certain documents had gone astray. Also, as we saw in case two, the ability of the panel to focus on what the appellant is actually claiming is greatly facilitated by the presence of the appellant, a point the chair explicitly states (case two lines 158 and 159). The chair expresses a preference for dialogic hearings over monologic hearings in decision making. This expression compliments the appellant for taking the trouble to attend, and may be taken by the panel as a demonstration of the appellants seriousness and concern towards the case. It also seems to imply that a significant number of appellants do not attend. Thus, we can understand monologic and dialogic presentations in terms of the possibilities of the types of work they afford.

The main aspect I wish to draw attention to here is that whether a case is monological or dialogical creates a contextual situation which affects the nature of the decision making practices of the panel. Although as was stressed above this use of a binary categorization tool has to be recognised as in essence a loose, but informative description, rather than a foundational categorization technique to be imposed upon a phenomenon. The unique situatedness of a phenomenon and its associated activities always remains paramount.

4.6 Summary.

This chapter has covered a large amount of data - ten cases and a large amount of activities - phases. To bring them all under a single discussion would be to recover issues that were raised and discussed in some detail in each of the sections, as they will all be seen to be relevant in the following two chapters.

One of the aims of this thesis has been to show through the presentation of unique instances the practices involved in legal aid appeals tribunals. One of the problems which is associated with doing this is that in presenting the data in some sort of systematic way, such as in the four 'phases' of this thesis, we impose an order that can too easily become a rigid constraint on what are unique occurrences. Such a constraint on the data can become a theoretical model in which we then view similar phenomena. It is hoped that, while pains

have been taken in this thesis to keep the reader aware of the problems of doing this, case five of this section gives a clear example of why this caution needs to be taken.

In brief, we have seen on occasions what is evident is that it appears that actual documentation and its deliberation, even after the discussion with the legal representative and/or the appellant, does not result in an unambiguous interpretation of events and their relation to the legal statutes and legal practice. The key point being though, that this does not necessarily prevent 'adequate' legal decision making.

We also saw instances where this disparity of views on the documentation and rules was not evident in the delivery of a decision, on the contrary the very same documentation and rules were given as justification for the panels decision, and presented as being uniformly agreed upon. Although it is necessary to stress again that this practice does not mean that the decisions are necessarily 'wrong', 'mistaken', etc. just that they are the practices that on occasion constituted actions recognised as legally valid.

Also we saw case descriptions where the presentation technique of the use of 'phases' did not adequately reflect actual practices on occasions, and that that was due to the flexibility of members to the specifics and circumstances of individual cases. Yet again this did not indicate that such practices were any less legally adequate than others and that their 'legality' and validity as tribunal processes must be in actuality situationally organised and agreed upon by the panel members concerned. In fact, it was suggested that if we considered the work of Zimmerman (1971) on rule-following in an administrative bureaucracy, that such rule-breaking activity could possibly be best understood as situated activities of contingent activity based upon the 'meaning behind the rules'.

Finally, it was suggested through the description of non-attended and attended tribunals as either monological and dialogical respectively our understanding of these phenomena could be facilitated. However, it was emphasised that the use of descriptive categories should not be taken in foundational terms and must not subsume the specifics of the unique situated

activity itself.

In the following chapter we will look at the issue of rule following specifically in relation to the repecification of legal positivism in legal practice and jurisprudence.

Chapter Five - A Critique of Legal Positivism.

"Viewed with respect to the practices for making it happen, a routine inquiry is not one accomplished by rules." (Garfinkel 1967b:174)

What makes law different from the natural sciences is that the subject/topic of legal theory, laws themselves, are themselves artifacts. As are the institutions built up around them, not just the documents recording the laws, legal activity and terminology. It is not surprising that there is a sceptical stance taken towards the essential positive view of law, and has been from Plato onwards. Scepticism of law is seen as being either weak or strong. In its strong sense such scepticism makes a call for the abolition of law and has been associated historically with anarchist and utopian writers, as well as some Marxist commentators. It is the weak form of scepticism towards law that is of more interest to us in this thesis. In its weak form:

"From Rabelais to the modern school of legal realism, sceptics have argued that legal decision-making is divorced from legal rules and that the power of law-making lies in the unfettered discretion of judges, tribunals, and law enforcement agencies." (Goodrich 1995:472)

This is an issue an empirical investigation such as ours can shed light on as it investigates the actual practices of legal interaction in situated activity.

In this chapter we will focus on the 'epistemic' of legal positivism and shall look at this theme as both a theoretical position and a practical orientation by legal practitioners. Legal positivism is a major philosophical orientation within jurisprudence and we will not be attempting to address all of the possible orientations to legal practice that it encompasses. Instead in the first section of this chapter we will briefly sketch the philosophical history of positivism in law before focusing on the issue of rule following, decision making and aspects of related document use, the arguments discussed will not be legal positivists', but those relating to Dworkin's defence of law as epistemologically special and the inherent positivism in his approach. It will be suggested that such theoretical

debates can only be resolved by empirical research. This section is focused heavily on a few arguments, and while quite technical I suggest it highlight certain aspects of our research descriptions. In the second section we will move on to the issue of decision making and the positivist approach to this, and look at these issue with reference to the empirical data of this thesis. In the final section the theme is the issue of decision delivery and their accounting practices, here as well as referring to the empirical data of this thesis, it will be suggested that we can be facilitated in our investigations by reference to the ethnomethodological studies of science. It will be suggested that some of the seemingly intractable debates surrounding legal positivism can be clarified via an ethnomethodological respecification of the epistemics around which much debate centres.

5.1 Legal Positivism.

Although there is not space, or need, to concern ourselves with the history of philosophy of law in any great detail, it must be noted that the history of the philosophy of law has had as an abiding concern the differentiation of law from other practices and principles of human decision making. A central concern here for the philosophy of law is in its separation from ethics, politics, history and social theory, since Law is both an institution and product of human reasoning:

"Laws and legal systems, like their human makers and subjects, somehow belong to the four sorts of order with which human reason is concerned - roughly, natural, logical, moral, and cultural. Using the conventional symbols of an ordinary language, and supplementing them with new conventions and techniques, legal rules articulate conceptions of the natural order (which reason does not make but only considers), of logical consistency and implication, and above all of rightness and wrongness in official and unofficial deliberation and action." (Finnis 1995b:469)

Legal theories tend to focus on one of these paradigms of order at the expense of the others. If a theory is simultaneously attempting neutrality

adopting any one orientation in order to define law is problematic though, as to do so is to adopt an a priori position towards any substantive issues in such a definition. The most common form of such reductionist theories of law have been attempts to reduce law to some form of logical, or positivist, order e.g. Hobbes' notion of contractual obligation where a breach is equated with logical absurdity, these have been seen to fail though as "the normativity of practical reasoning and legal norms is not reducible to logic's normativity, but rests on the necessity of means to or respect for basic ends" (ibid:471). In the philosophy of law this might now be a recognised situation but it has not always been the case.¹

A form of legal positivism first arose in the fourth century B.C.. Legal positivism here being in the form of the assertion that "to be described with realism and clarity law must be considered without regard to any moral predicates which it attracts in discourse (e.g. moral-political evaluation) outside the philosophy of law." (Finnis 1995a:465) This was in contrast to 'natural law' theory in which law was intrinsically linked to the community in which it operates, a division in legal theory which still operates today. Although a positivist orientation to law can be traced back to the age of Plato, the stance of positive law and the term itself is attributed to Thierry of Chartres circa 1135, with theoretical definitions via Thomas Aquinas in the Thirteenth Century, Jeremy Bentham in the Eighteenth Century, and John Austin (via Thomas Hobbes) in the Nineteenth Century (ibid:465-468). So as we can see the positivist view of law has been a central tradition throughout the history of the philosophy, and as such has tended to be the position around which many of the debates in the philosophy of law focus.

The move to 'legal positivism' developed out of the utilitarianism climate where law as it *is* and law as it *ought to be* were distinguished. That law

¹ The idea that laws are positivist in that they are designed by and for human co-ordination has been contested by legal realism, where law is instead defined as the prediction of judicial action (Finnis 1995b:471), and by Dworkin where the reliance is on judicial individualism.

as it *is* and as it *ought to be* should be seen as separated was advocated by Jeremy Bentham who asserted that law and morals were separate. Here legal obligations were not seen to cease when an individual decides that a law cannot be followed for reasons of morality, the legal positivist view being that the judicial validity of law remained, although this did not prevent laws being condemned on moral grounds (Lloyd 1964:99-103). Legal positivism acquired its pretensions to 'science' with Bentham's development of utilitarianism, but it was his disciple John Austin who is attributed with development of 'the science of positivist law'. Austin emphasising even more the distinction between *is* and *ought* in law, with the *is* being the province of the science of legal positivism. For Austin Law is a self-contained body of rules open to scientific investigation exposition of its working and deliverance across 'developed' legal systems via the conceptual understanding of jurisprudence (ibid:107-108).

This conceptual approach can be seen to be criticised on at least three accounts; firstly, that it develops a version of law as having a coherent inner structure which new developments in law must adhere to. Secondly, that it promotes a 'logical' view of the development of law which disregards the role of policy. And the third criticism, and one directly aimed at Austin, being that:

"Austin seemed to overlook that the level of investigation on which he contemplated that his science of positive law would operate was really only what we would call second-order facts, namely the rules of law as contained in the statutes, recorded cases, and law-books associated with given legal systems." (ibid:110)

In doing so Austin ignored the mass of first-order facts of the situated actions of members of the legal professions and those who have dealings with them. That once law is placed back in the hands of members in situated activity, crucially, the issue of the separation of the *is* and *ought* notions of law can become problematic. This issue of morality, the *ought*, and its situated fusion within legal practice has often been a central topic in the discussion of legal positivist jurisprudence, and one attended to by H.L.A. Hart in 'The Concept

of Law' (1961) a defence of legal positivism² in the following definition:

"Here we shall take Legal Positivism to mean a simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so." (ibid:181-182)

The reason that Hart attends to the issue of morality is because of his concern with the scope of law that jurisprudence is to concern itself with. Hart argues for the concept of law to be a broad rather than narrow definition, one that will include laws that may, for whatever reason be seen to be too iniquitous be judged as valid - the narrower version excluding these. The adoption of the broader definition being preferable as it includes the narrower version, the significance of this being that Hart sees the narrow version leading to confusion since any such exclusion divides efforts to investigate law and oversimplifies the moral issues involved. Whereas the broader version allows a separation of the concepts of the invalidity and immorality of law which the narrower version confuses (ibid:204-205).

² Legal positivism does not exist as a single coherent body of thought, and although Hart describes five core meanings of legal positivism in contemporary jurisprudence (below), not all representatives of legal positivism hold to each of these five meanings.

"(1) the contention that laws are commands of human beings;

"(2) the contention that there is no necessary connection between law and morals or law as it is and as it ought to be;

"(3) the contention that the analysis (or the study of the meaning) of legal precepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, 'functions', or otherwise;

"(4) the contention that a legal system is a 'closed logical system' in which correct decisions can be deduced by logical means from predetermined rules without reference to social aims, policies, moral standards; and

"(5) the contention that moral judgements cannot be established or defended, as statements of fact can, by rational argument, evidence, or proof ('noncognitivism' in ethics)." (H. L. A. Hart *Essays in Jurisprudence and philosophy*:57-58. Quoted from Davies and Holdcroft 1991:3)

The is/ought debate is an extensive one in jurisprudence and in what follows we will cut a path through this looking at issue located within it this debate, that of law as rule following.

5.1a Rule Following.

Weissbourd and Mertz (1985) note that the idea that the law is a system of rules is central to many Western concepts of law. They believe H.L.A. Hart exemplifies this tendency by conceptualising legal practices as social processes in a decontextualized and static fashion.³ In contrast, Weissbourd and Mertz argue for a "legal creativity" which emphasises non-deductive reasoning, that argues that law is practice as well as a system of rules. Their critique stems from a linguistic position in which they accuse Hart, and others, as being biased towards a semantic, and de-contextualised, view of the role of language in law (ibid:623-624). They draw a parallel between the legal philosophy of Hart and the linguistic philosophy of John Searle. Accusing both of a concern for rules over process, and of their use of the distinction between 'creativity' and 'supposition', suggesting that such a distinction is not evidenced in everyday speech, and that the legal view of language relies heavily on notions of supposition in language.

Weissbourd and Mertz note that the conception of law as an *a priori* set of rules or principles to be consistently applied fails to reflect the 'reality' of legal practices. That the process of applying rules in differing social contexts results in changes in the meaning of the rules in question (ibid:640). They assert the peculiarity of Western law in neglecting this, and show that legal anthropology demonstrates that in other cultures legal ideology sees the discourse itself is as an aspect of what 'occurred', not just its content to support this assertion. The Tswana are cited as an example here, since for the Tswana

³ Although Hart's (1961) notion of 'defeasibility' does suggest that laws are not always applicable despite their seeming relevance. Heath and Luff (forthcoming) illustrate this concept in relation to the use of medical records.

all social facts are seen "as culturally constructed products of ongoing human speech interaction.... Rather than emphasizing the prerequisite, static aspects of law, the Tswana put the most weight on creative, contextualized interaction" (ibid:646).

The reason why Western legal theory, as exemplified by Hart, downplays the context of legal processes is, Weissbourd and Mertz believe, due to the process of abstraction:

"While other cultures frequently look to the actual dynamics of contextual interaction for underlying 'truths', the Western system, in its appellate courts, in its law schools, in the way its law-makers talk about the law, contrasts a system of rules with unanalyzable contextual factors. This viewpoint downplays, in the language of semiotics, the 'pragmatic' or context-bound elements." (Ibid:649)

In conclusion Weissbourd and Mertz suggest that "we must look for some particular socio-cultural basis for this insistence on a deductive decontextualized regimentation wherein a system of definitional equivalences provides the guiding framework, and whereby legal process becomes simply an instantiation of rules." (ibid:657) The emphasis here given to the absence of the role of context in the application and interpretation of rules is a criticism made not only by Weissbourd and Mertz.

Costas Douzinas et al. (1991), in an attempted deconstruction of the positivist interpretation of legal process⁴ via a critique of Dworkin's critique of

⁴ While there is no space to discuss Douzinas et al.'s (1991) adoption of deconstruction, Lynch (1984), noting the ethnomethodological alternative, states of deconstruction:

"Deconstruction is not exempted from the problems associated with correspondence. The task of deconstruction often is defined as one showing how statements, initially held out to be unmediated representations of 'reality', are actually bound-up in rhetorical strategies, forgotten histories, and muted controversies. Such a conception of the deconstructive task remains committed to a view of representation as a relation between linguistic or non-linguistic 'statement' and what the statement purports to represent. *That* view itself needs to be 'deconstructed', but in a different way." (p147-148)

This move from the critique of legal positivism, to the

Hart, notes that:

"Formalist theories usually distinguish between the structure, grammar, or code (*langue*), and their instantiations or propositions (*parole*). The job of theory is to classify the workings of the machine, show how the rules formally cohere, while the instantiations are left relatively untheorized." (ibid:55-56)⁵

This critique is similar to that of Weissbourd and Mertz, though Douzinas, recognises that Hart does deal with the instantiations of law. That Hart does so through the use of categories of 'core of settled meaning' and 'penumbra of doubt', which introduce judicial discretion as a factor into the law. It is exactly these notions that are problematic for Dworkin, since for Dworkin this results in the positivistic notion of the law being threatened. Not that Dworkin denies the existence of discretion as such, but rather what he terms Hart's 'strong discretion' (ibid:56).

Dworkin's own theory, to counter that of Hart, Douzinas et al. state is that:

"The grammar of principled legal meaning both sets in motion and delimits acts of legal interpretation and application. It is in this sense that 'right answers' exist to all legal problems. If all legal meaning, the whole object 'law', is produced through the bringing to the surface of underlying values, every new act is an instantiation of the code in a new context and therefore necessarily an application of those principles. Right answers exist because the law itself is a 'grammar of rightness'." (ibid:56-57)

Through this mechanism differences in the application of the law come from 'reasonable' disagreements in the application of those principles, but there is

ethnomethodological critique of representation, is not as large as it may seem since the ethnomethodological critique of representation stems from investigations into the investigations of positivist natural science.

⁵ This position contrasts with the Russian Formalism of Bakhtin who believes that the discussion of instances and their context is not unscientific, but 'differently' scientific (Bakhtin 1986:160).

only a narrow band of 'reasonable disagreements' as certain theories fail to fit with legal materials.

However, Douzinas et al. claim that Dworkin's theory's attempt to transcend the problems of positivism is built upon the inapplicable use of aesthetics and hermeneutics. Derived from Kant, aesthetics is used to provide judgements with validity and universality since "the aesthetic point of view allows the individual to transcend the twin dangers of abstract universalism and blind individualism, rigid objectivism and uncontrolled subjectivism." (ibid:59) The method is simple, the transference of the conceptualisation of aesthetic judgement out of the realm of aesthetics and into some other realm of judgement. A move used by both Hegel and Rousseau, and also used by various modernist theories. When used by Dworkin in legal theory the resulting conceptualisation is, for Douzinas et al., that:

"Law is an interpretative exercise. Legal interpretation resembles the interpretation of literary texts which can therefore be used as a model for understanding the law. At the centre of the edifice lies an aesthetico-hermeneutic hypothesis. All interpretation is constructive, it imposes 'a purpose of an object [of art] or [social practice], to make it the best possible example of the form or genre to which it is taken to belong' (Dworkin 1986:52)." (ibid:60-61)

A test of adequacy rather than aesthetics, transferred into practice this becomes:

"The judge must construct a theory of political morality that will show the law in its best possible light. The theory must fit both the institutional history of the community's laws and include normative claims about the purpose of the enterprise. Judges may reasonably differ on this, as do art critics on the question of where aesthetic value lies." (ibid:61)

In this fashion Dworkin attempts to counter the problems caused by the acceptance of judgemental discretion in positivist legal theory.

A different perspective on the positivism of Hart and Dworkin is taken

by Jackson (1988)⁶ in a study of the phenomenon of adjudication in court,⁷ here he attempts to put into relief the complex activity of adjudication in contrast with the formalist version of "normative syllogism",⁸ stating that:

"This complexity consists not merely in the different interactional contexts which make up this 'activity'; it is constituted also by the inevitable involvement within these discursive practices of non-legal structures of understanding." (ibid:1)

By this Jackson means the use of forms of understanding which are not subsumed under the title of positivist modes of objective legal rationality. Jackson, in a discussion of Dworkin's version of judicial interpretation in the legal positivism of Hart, believes that although Dworkin puts the question of legal rationality at issue, Dworkin himself adopts too narrow a interpretation of legal rationality in decision making. Especially in relation to what can, and can not, be explicitly stated by judges in the course of justifying their decisions, Jackson believes that Dworkin's stance against the positivism of Hart, itself contains three major tenets of positivism. These are:

"First, that 'the Law' exists as a single unified system, and that only one system exists within any [nation] state; second (to put the matter at its

⁶ Jackson notes that while both Hart and Dworkin were claiming to describe judicial discourse they were in fact probably describing legal disclosure and doctrinal discourse respectively - Jackson himself claims to be focusing on a third discourse, that of adjudication. Though he does not suggest that their relative descriptions provide adequate semiotic accounts of these - this is not surprising of course, as neither of them were aiming to do so. This raises the question as to whether they are not all talking about different things and that critiques in each others' terms is misconceived!

⁷ Jackson believes adjudication to have achieved the status of the paradigm of legal activity (1988:1).

⁸ Syllogism is a deductive inference by which a conclusion is derived from two propositions a major and a minor premise. A form of deductive reasoning from the general to the particular. So normative syllogism is a form of deductive reasoning based upon prescribed norms, in this case the Law.

weakest) that there exists an intimate connection between decision-making and interpretation, and that normally interpretation of the law is determinative of its application to facts; third, that there exists a specifically legal form of interpretation, one that belongs to an autonomous legal universe." (ibid:131)

Jackson, discussing the first of these, makes the point that within the teaching, discourse upon, and practice of the law there exists a co-referentiality to a single entity which exists outside any particular discourse, and that entity is "the Law" (Ibid:132).⁹ Jackson takes issue with Dworkin's adoption of the metaphysical and posits an alternative view of legal rationality, derived from the semiotics of Greimas, and focusing on the notion of semiotic groups. A semiotic group being a group "within which messages are sent, received and understood, without necessarily implying any authorial intention on the part of the 'sender' as to the identity of the particular 'receiver'" (ibid:134). Jackson, contrary to the 'unified' version of law by Dworkin, believes that by showing that within the semiotic group of English Law there exist a plurality of smaller semiotic groups and this plurality of groups generates "a powerful semiotic argument against the positivist postulate of the unity of 'the Law'" (ibid:135).¹⁰

The second tenet of positivism that Jackson claims to locate in the work of Dworkin is that there is a necessary relationship between interpretation and decision making, and that the former determines the latter. Jackson notes that this position has already been attacked by legal realists who argue that decision making often differs from this positivist model and that judges decide cases differently from the normative syllogistic way in which they explain their

⁹ Of note here is the similarity between the conception of the entity of 'the Law', and the conception of 'reality' in positive natural science discourse which also exists as an external entity outside any individual discourse. Thus both legal and scientific positivism seem to make similar metaphysical claims.

¹⁰ This positivist notion of the singular unity of the law as further attacked by Jackson whose Greimasian semiotics argue that such concepts as 'the Law' do not have a metaphysical existence, but are instead internal constructions of discourse (1988:140-141).

judgements.¹¹ This we have seen illustrated in Chapter Six above in the phase four delivery of decisions and in the formalising of the version for the documentation at the end of phase three. Jackson, however, disagrees with the legal realist position claiming that their version of the divergence of interpretation and decision-making is a contingent one, i.e. that it may occur in some circumstances, rather than a conceptual one, i.e. that by definition they must be separate. Jackson argues that interpretation is an exclusively propositional affair based upon semantic and syntactic relations, while decision-making is based upon pragmatics. It is these conceptual differences, he argues, that are conflated by Dworkin and end up reinforcing the positivist tenet of the interrelationship of interpretation and decision making. (Ibid:143-146)

Before developing this second aspect further we must comment on the third positivist aspect of Dworkin's position for Jackson; the autonomy of the law.¹² For Jackson, the autonomy of legal reasoning is in fact "...a facet of the narrativised struggle for the autonomy of the legal profession" (Ibid:148).¹³

¹¹ A claim that is also made in relation to the practices of natural scientists in the presentation of their results (see Livingston 1993).

¹² This might look compatible with Jackson's own semiotic method, but he claims that this is not the case. He denies the positivist acceptance of a unitary justificatory discourse claiming that the role of unconscious reasoning and the 'narrativisation' of pragmatics annul such a claim (Ibid:147). Jackson notes that his own semiotic position has been described as a form of positivism, especially by P. Goodrich in 'Review of Jackson, Semiotics and Legal Theory', *Modern Law Review* 50 (1987), 117-123, and unconvincingly, in my view, argues against it.

¹³ This is a narrative struggle for autonomy, rather than being struggle to be autonomous in 'fact', or 'reality'. Foucault's view of the judiciary is that: "In the Middle Ages there was a change from the court of arbitration (to which cases of dispute were taken by mutual consent, to conclude some dispute or some private battle, and which was in no way a permanent repository of power) to a set of stable, well defined institutions, which had the authority to intervene and which were based on political power (or at any rate were under its control)." Foucault, Michel (1980), 'On Popular Justice: A Discussion with Maoists' (Chapter 1 in ..) 'Power/Knowledge', Hemel Hempstead, Herts. Harvester Wheatsheaf. Originally published as 'Sur le justice populaire: debat avec les maos', in *Les Temps Modernes* 310 bis, 1972. A state of affairs which

This would seem to fit in with the retention of the positivist model by legal practitioners in the face of the positivist decline as the jurisprudential model.

Jackson illustrates Dworkin's conflation of interpretation and decision making by referring to the supposed differences between 'hard' and 'easy' judicial cases. An 'easy' case being one in which the answer, locating it within a body of judicial reasoning, appears unproblematic, a 'hard' case being where this is problematic. These cases being referred to as 'core' and 'penumbra' respectively. Jackson's point here is that such divisions of cases are in fact rhetorical strategies "relevant to the justification of the resolution of cases" (Ibid:146). Focusing on Dworkin's claim for the existence of 'easy' and 'hard' cases. We can further say that 'easy' cases are those in which decision-making is seen to be, in a positivist fashion, determined by interpretation, "through a version of syllogism itself, or quite simply by stipulation of the decision as self-evident, not requiring justification" (Ibid:147). 'Hard' cases, on the other hand, being those where there is no obvious unproblematic answer or decision available, thus allowing rational dissent (Ibid:146).¹⁴ Reasoning by decision-makers in 'hard' cases, is for Dworkin somewhat parallel, though not identical, to that of literary critics.

There are two comparisons Dworkin makes when he talks about literary methods, though as Jackson remarks he seems to use them interchangeably. The first is that Dworkin sees the literary critic as confined to interpret the text with regards to the narrative consistency, and unable to introduce issues that are not 'available' in the text. In the same way, Dworkin believes, according to Jackson, the "law is to be regarded as a literary whole, but consisting of norms rather than facts" (ibid:149). This seems to indicate that Dworkin sees the law

he believes remains to the present day.

¹⁴ This dividing into 'easy' and 'hard' is what the ethnomethodological viewing of cases as unique avoids. Although we saw in Chapter Six cases arise where decisions are made in a fashion displaying disagreement among decision makers, the practices the members employed on these occasions were clearly situationally dependent on the case and its presentation as on-going activities rather than with reference to 'easy' or 'hard' external categorisations.

as a unified whole which has an underlying set of norms, and the decision maker can only make a legal decision if they remain within this narrative of norms.

The second analogy which Dworkin makes between law and literature, is with the 'chain novel'.¹⁵ Here Dworkin believes that as the novel is passed from one author to the next in the chain novel, the freedom of successive authors becomes more restricted. Jackson believes that Dworkin confuses the role of the judge with these analogies, because in practice the judge is both author and critic (ibid:150).

Jackson, picks up on the problems of a positivist version of legal decision making which allows processes similar to those of literature, especially when, as Jackson notes, the difference between 'easy' and 'hard' cases is actually a semiotic construction independent of how the case is solved (Ibid:151).¹⁶ The implication being that, if we take the difference between 'easy' and 'hard' cases to be a rhetorical or semiotic constructs, the documents of all legal cases are open to the methods of literary interpretation, and all cases can be 'affected' or 'use' literary techniques of interpretation.

The key issues that Jackson raises are: 1) the inevitable involvement within legal discursive practices of non-legal structures of understanding; that within the semiotic group of English Law there exist a plurality of smaller semiotic groups and this plurality of groups generate an argument against the positivist postulate of a unified 'Law'; 2) that decision making often differs from the positivist model in that judges decide cases differently from the normative way in which they explain their judgements; 3) the autonomy of legal reasoning is in fact a narrative struggle for the autonomy of the legal

¹⁵ This connecting of law and literature exists elsewhere in legal studies, notable among these is James Boyd White (1984:xi) who aims to " ...set forth a rather different conception of law from those that presently prevail in academic circles: as an art essentially literary and rhetorical in nature, a way of establishing meaning and constituting community in language".

¹⁶ That there is no clear dividing line between 'clear' and 'hard' cases is also held by McCormick (1995).

profession; 4) the difference between 'easy' and 'hard' cases is actually a semiotic construction independent of how the case is solved.

In his critical essay 'Working on the Chain Gang: Interpretation in Law and Literature' (1989a) Stanley Fish picks up on Dworkin's use of literary methods in 'Law and Interpretation'.¹⁷ Fish interprets Dworkin's position as "concerned to characterize legal practice in such a way as to avoid claiming either that in deciding a case judges find the plain meaning of the law 'just there' or, alternatively, that they make up the meaning 'wholesale' in accordance with personal preference or whim." (Ibid:87) Fish focuses on Dworkin's use of the 'chain' novel as an example of document production and use in law to illustrate that Dworkin's characterisation of legal practice is confused. The exact details of this critique are not significant here, and we will instead focus on its textual aspects.

Fish states that Dworkin sees decisions based on texts as being constrained by that text, and that disagreement can be settled by reference to that text. But, Fish points out, it is due to the fact that the text can lead to different assumptions in different circumstances that disagreements occur in the first place.¹⁸ In relation to the example of the chain novel, contrary to Dworkin, Fish believes that the first writer is no less constrained than the last, that the first author does not have absolute freedom to write, which is how Dworkin perceives their position, but are as confined to the genre in which they are working in as much as the last writer. In doing so Fish dismisses Dworkin's negative analogy whereby the judge, like the first author in a chain novel, can make any decision they like. With regards the last author, Fish argues that they are as able to head in new directions to the same extent as the first author, as

¹⁷ Richard Dworkin, (1982) "Law as Interpretation", Texas Law Review, Vol. 60.

¹⁸ This would seem to be illustrated in our data when tribunal panel members disagree upon their initial readings, which they have undertaken prior to coming to the tribunal, and how these may then change in the changing circumstances of the following phases of the tribunal.

long as it make sense within the genre, and so it is also the case for the judge.¹⁹

In fact Fish accuses Dworkin of embracing both the positions he wishes to deny. Since Dworkin believes that position of a judge is analogous to that of the author at the end of a chain novel, in that they are prevented going off in a new direction due to the precedent of the earlier writer, and that so are judges by the precedents of earlier judges. Dworkin's position, Fish states, is that: "Interpretation that is constrained by the history one finds will be responsible, whereas interpretation informed by the private preferences of the judge will be wayward and subjective." (ibid:93) The critique Fish makes of this is that:

"he [Dworkin] assumes that history in the form of a chain of decisions has, at some level, the status of brute fact; and he assumes that wayward arbitrary behaviour in relation to that fact is an institutional possibility." (Ibid:95)

And that by doing so he assumes the two positions, those of legal positivism and legal realism, that he is trying to avoid.

Fish's own position is that:

"it is neither the case that interpretation is constrained by what is obviously and unproblematically 'there', nor the case that interpreters, in the absence of such constraints, are free to read into a text whatever they like." (Ibid:97)

This is in fact the position which, as we saw above, Dworkin wishes to adopt, but which he does by allowing the two possibilities which he denounces, as being possibilities. In arguing against these possibilities he ends up adopting a position which involves both of them. Dworkin's problems arise, for Fish,

¹⁹ From our data in this thesis we can say that the decision making and interpretations of the panel members are not totally sequentially constrained in some determinative fashion. Members can introduce new interpretations at potentially any point in the decision-making process as to the 'meaning' of the documents and related activities. At the same time the decision making activities are not without order.

due to his confusion over the interpretation of texts.

Fish, contrary to Dworkin, does not see explaining and changing texts as opposed activities, but as the same thing. Fish critiques Dworkin's understanding of the act of interpretation, whereas Dworkin wishes to impose constraints, for Fish "interpretation is a *structure* of constraints, a structure which, because it is always and already in place, renders unavailable the independent and freely interpreting reader." (Ibid:98) I suggest that the activities of the legal representative, appellant, and panel members in Chapter Four illustrates how the various interpretations negotiated by the participants in the course of the situated activities of persuasion and clarification do 'change' the texts. But our position is that the texts do not have a fixed interpretation independent of the activities in which they are invoked, so any change must be within this context.

This concept of freedom of interpretation by Dworkin is mirrored in his concerns over 'intention'. Dworkin believes that to focus on intention is to bypass the important interpretive context of historical practices and conventions. Fish criticizes Dworkin's view of an independent or unique interpretation as a possibly entity, one which could be focused upon at the expense of the 'proper' context. Fish instead argues that "Simply to do something in the context of a chain enterprise is ipso facto to 'have' an enterprise-specific intention, and to read something identified as part of a chain enterprise is ipso facto to be in the act of specifying that same intention." (ibid:99) By this Fish means that intention is an interpretive fact, that intention must be construed, and it is "therefore impossible to oppose it either to the production or the determination of meaning." (Ibid:100) Fish's conclusion that:

"In order for a case to appear readable independently of some interpretive strategy consciously employed, one must already by reading within the assumption of that strategy and employing, without being aware of them, its stipulated (and potentially controversial) definitions, terms, modes of inference, etc. This, at any rate, would be the argument I would make, and in making it I would be denying " (Ibid:101)

Fish explores Dworkin's analysis further in 'Wrong Again' (1989b). Here Fish explains that Dworkin believes that the organisation, style and figures of a text allow themselves to be used as a measure by which a proposed reading of a text can be made. Fish, in contrast, holds that these are in reality interpretive facts which are themselves established in the course of elaboration, thus disqualifying themselves as an objective measure. (Ibid:106) For Fish, this claim of Dworkin's is based upon the distinction between change and explaining, and is directly a result of his above misunderstanding of the nature of interpretation,²⁰ and can not be invoked without embracing positivism. (Ibid:107) What I suggest our research can add to this is that, as displayed in Chapter Four by the appellant, that while an interpretive strategy is employed, this interpretation is not static. Instead the interpretive 'strategy' employed by the legal representative, panel members, and appellant is continually reflexively related to the on-going actions and interpretations of the co-present members. Any interpretive strategy by a member is 'potentially' open to negotiation and challenge by the other co-present members, the final understandings of the documentation being arrived at through this process. The legitimacy of any interpretive strategy being both open to challenge and legitimised during the on-going interaction.

Fish, in his introductory chapter to 'Doing What Comes Naturally' (1989c) defines his own theoretical stance is anti-formalist, that he does not believe that words have clear meanings independent of the usages in specific occasions, and that "meanings that seem perspicuous and literal are rendered so by forceful interpretive acts and not by the properties of language" (Ibid:9).

²⁰ Fish believes: "...Dworkin is simply confusing a fact about interpretation in general - that the construing of intention can always begin anew even when the intention is one's own - with a supposedly special fact about aesthetic intention - that it leads to the creation of texts that live untethered to any intention whatsoever. ...The matter, however, is at once more simple and more complex. Neither artists nor anyone else can produce texts capable of being detached from intention; but since intention is an interpretive fact, there is nothing to prevent the intention of a text, including one you have yourself written, from being interpreted again." (Fish 'Wrong Again' ibid:118)

This anti-formalist position may be thought to invoke some form of relativism, but Fish is not arguing that there are no constraints to interpretation, but instead that the constraints that are in place are themselves interpretive (Ibid:27). This position is anti-foundational in that, although there will be "situations in which theory will be consequential, the direction and shape of this consequentiality will be a local, contingent matter" (Ibid:28). This anti-foundationalism does not argue that there are no foundations, but that the foundations are based upon cultural and contextual discourse.²¹

The key points here, and ones which much of our research gives support to are: texts can provide for different assumptions in different circumstances of use; explaining and changing texts are not opposed activities, but are the same thing; interpretation is not constrained by what is obviously and unproblematically 'there', nor is the interpreter free to read anything into a text; the distinction between hard and easy cases may be an empirical fact (as something one might experience), but not in terms of a basic difference between cases that are self-settling and cases that can be settled only by referring them to the history of procedures, practices, and conventions; the content of texts are interpretive facts which are themselves established in the course of elaboration, thus disqualifying themselves as an objective measure of interpretation (a point worth noting with regard to any attempt at an ethnomethodology of reading as we saw in Chapter One). The argument is not that there are no constraints to interpretation, but instead that the constraints that are in place are themselves interpretive.

Finally, it must be noted that Fish's anti-formalist and anti-foundational stance has been contested directly by Steve Fuller (1989) in his article 'Beyond the Rhetoric of Antitheory: Towards a Revisionist Interpretation of Critical Legal Studies'. Fuller believes Fish and other anti-foundationalists actually share many of "the deepest presuppositions of their 'positivist' foes...".

²¹ See Fish (1989c):30 for why anti-foundationalism is not a contradiction itself.

(Ibid:134) Fish's definition of theory, states Fuller, is itself a positivist reduction. (Ibid:137) Although Fish has stated that anti-foundationalism is equally open to the anti-foundationalist thesis itself, and can be so without contradiction until another argument "holds the field against it". (Fish 1989c:30) Whilst this in itself sounds like a reference to falsification theory, the criticism Fuller makes of what he calls 'Fish's positivistic theory of "theory"', is that:

"As Fish sees it, the theorist aspires to the algorithmic in that he would like to discover rules that can function as a guide to a humanistic discipline's practice in all cases by being sufficiently explicit and neutral for any practitioner, regardless of her particular interests, to follow the same result. A rule with heuristic status, by contrast, can guide practice only in certain cases which cannot be determined in advance of practice but only, in retrospect, once practice has been successfully guided by the rule. In short, the desired distinction is between "the fool proof method" and "the rule of thumb." (Fuller 1989:136)

Fuller's critique of Fish's anti-foundationalism is quite extensive though the focus seems to be aimed at the politics of Critical Legal Studies, and putting the case for legal realism - issues which are not of direct interest to us here. However, Fuller's raising of the issue of heuristics in the context of positivism is. In his conclusion Fuller notes: "A philosopher of science happening upon the antitheory debates would immediately be struck by the narrowness of the philosophical spectrum occupied by the disputants." (Ibid:149)

5.1b Section Summary.

Starting with a brief outline of legal positivism we have looked at debates upon this issue that have attempted to show its problematic nature, these have revolved largely around, not legal positivism itself but the problems of Dworkin in trying maintain that law is epistemologically special while trying to avoid a legal positivist position. We have seen that one aspect of the arguments that have been levelled against Dworkin revolve around the role of documentation

in the legal process. Whilst these arguments have proposed a view of legal practice that in many ways are supported by the earlier chapters of this thesis, the debates have tended to remain at a theoretical level. The result being that these debates, as we saw in the case of Fish end up being challenged at a theoretical level themselves, and apparently failing to resolve the issues raised. Even Jackson's arguments such as the inevitable involvement within legal discursive practices of non-legal structures of understanding and of the existence of semiotic groups, never leaves the theoretical level to enter into empirical investigations. We have only looked at one small aspect of the legal positivism debate, the material present though did raise, even if only at a theoretical level, some interesting issues as to the nature of legal practices. However, we have to move out of the jurisprudence forum to locate any concern for empirical research, not surprising , it comes from those concerned with real-world practical concerns. For example, Hawkins (1983) whose concern is largely with parole policy in the U.S. notes the "lack of research explicitly focused on the question of how decisions are made actually made is surprising" and calls for a rethinking of legal theory on decision-making and calls for this to be based upon ethnographic research. It is through empirical research, and possibly only empirical research, I suggest that these issues can be resolved.

5.2 Section Two - Decision-making.

So far we have looked at some of the issues relating to legal positivism as they have been attended to by a number of commentators at a theoretical level within discourse on jurisprudence, now we shall move to some of the debates within the sociology of law and then address these to the empirical findings of this thesis.

5.2a Sociological positions.

An issue that legal positivism has to deal with is that new laws are often created superseding old laws. The existence of the possibility of change in law brings with it the awareness of the fact that a "given valid law constitutes a selection achievement and is valid due to this continuously alterable selection" (Luhmann 1985:161). So although a law may be on the statute books, positive law can not assume that a law is good for all time. Legal positivism recognises that laws are dependent upon sovereign power, or its equivalent, and a change decreed by the sovereign produces a change in law which will be accepted by officials as the rule of practice for legal decision making. There is some similarity here with Popper's (1959) method of falsification, although hypothesis testing does not have its equivalent in the positivist view of judicial law validity.²² Laws are treated as true until overturned, and in spite of the fact that they may be overturned. It may be argued that the differences between the nature of legal and scientific laws and rules of procedure differ from each other in their subject matter to such an extent as to make any comparison void. However, I would suggest that this is not the case, to the extent that both have built into them the possibility, even the likelihood, of their current practices being over turned. Although how this is achieved is not necessarily similar.

However, just as Kuhn (1970) has shown Popper's 'falsification theory' to be inapplicable to scientific practices, so the sociology of law rejects 'positive law's' inability to incorporate social processes into legal change - except by ignoring them. Though this issue of positivism in law is not one of

²² Case Law would seem to seem to hold similarities to the method of falsification but, I would argue, that although case sets precedents, these precedents are not as such falsified, but 'joined' by contrary judgements. These contrary judgements can, and usually are, used to set new precedents to be followed, but it is not the case that new precedents can not be themselves replaced by the original precedents they overturned. The method of falsification, firstly, does not set precedents to be followed as such, rather shows the previous theory to be incorrect, though the falsification may be accompanied by a new theory but it is not necessary to prove the prior theory incorrect. Secondly, the scientist, unlike the judge, can not reinstate the old theory/precedent by making a decision in accordance with it. Theories and legal precedents differ subtly in their *modus operandi*.

the situated action of legal practice since the positivity of law in the philosophy of law and legal science is grounded in the statutory nature of law and its validity of emergence and basis, and that the study of law in practice should not be confused with the social processes of law making. A position which contrasts with the concerns of positivism in science which see itself based on empirical findings and associated practices. As Luhmann (1985) states, "classical legal scientific positivism is met by broad rejection today (more so, by the way, than scientific positivism)" although notably adding that "serious attempts at replacing it with another theory of law are not apparent." (Luhmann 1985:159)

Central to Luhmann's critique of legal positivism, is that it is important not to see the functioning of law as emanating from the hand of the legislator, but from society at large. That legislative procedure is rather, "the selection from and giving symbolic dignity to norms as binding law. The process of law formation embraces the whole of society. A procedural filter is employed within it through which all legal thoughts have to pass to become binding law for society" (1985:160). Hence, a positivist attribution to the validity of law on a originating moment does not provide an explanation of causality, i.e. "the historical fact of legislative decision making is... not a sufficient indicator for the positivisation of the law thus established" (1985:160).²³

However, while Luhmann may be correct in his dismissal of legal positivism as holding any real currency for any social theorists of law, it is not necessarily the case that practising lawyers are of the same opinion, in thought or action. As Cotterrell (1992:2) notes:

"In the Anglo-American legal world, and indeed to a greater or lesser extent in most modern highly-developed legal systems, a positivist

²³ It is worth noting the similarities of this critique of positivist legal theory with the descriptions of the adoption of new laws in science by Thomas S. Kuhn (1970). Although constituent communities are not the same, and science would not see normative change in society in general as determinative of change in scientific law. At least not in the sense the Luhmann attributes to changes in legal law.

outlook on law is the typical outlook of lawyers and informs much legal scholarship and teaching. Law consists of data - primary rules - which can be recognised as such by relatively simple tests or 'rules of recognition' (Hart 1961).... According to a positivist conception, these rules of law - possibly with some subsidiary legal phenomena - constitute the law, the data which it is the lawyers task to analyse and order. In this sense, law is a 'given' - part of the data of experience. If it can be recognised as existing according to certain observational tests it can be analysed. *The tests by which legal positivism recognises the existence of law or particular laws are thus analogous to those by which a scientist might recognise the presence of a particular chemical.*" (Italics added)²⁴

Thus while legal positivism at an epistemological level may have come under much attack, this does not indicate that it is not a working epistemological position, or justificatory one, for practising legal professionals. It may be thought that practising lawyers use of 'positive law' differs from 'positive science' in their avowed aims in professional practice; that science is a dynamic progress rather than a static application of rules. Although as this thesis has shown the idea that lawyers implement a static implementation of rules is not necessarily the case. Nevertheless, this does not mean that lawyers do not rationalise that they take up 'positive law' in a fashion which Hart terms, as "dependent upon the idea of an ultimate rule, the rule of recognition, which is accepted by, and motivates the action of, officials within the system" (Davies and Holdcroft 1991:142). Although it would be to underestimate the dynamic aspects of law which are affected by the work of practising lawyers and the outcomes of their work.

Though Cotterrell (1992) does take a similar position to Luhmann in his critique of positivism, that it looks at law "as far as possible without looking behind the legislative rule to the process by which they are created, and without

²⁴ Here I suggest we can see a basic similarity with the position taken by Lynch (1985) who suggests scientific facts are those constituted in laboratory practice rather than abstract theoretical constructs. Although without doubt, Cotterrell is suggesting that lawyers do see law as 'given', much as in the way a laboratory scientist may take a scientific fact to exist as a naturally given independent object.

considering judicial attitudes or values" (ibid:10) Cotterrell believes, reflecting aspects of the debates about legal positivism discussed above, that though there are:

"...powerful professional reasons for [the] maintenance of a positivist outlook in legal analysis" "it is significant that, as a philosophy of law, positivism has come under powerful attack in recent years. It has been charged that it ignores the role of values in law and the way law is established in interpretation, that in treating rules as the given data of law it assumes a certainty and clarity in rules that is by no means apparent, that it can not cope with the complex relationship between rules and discretionary powers of officials in legal regulation in complex contemporary societies, and more generally that it cannot provide an adequate basis for understanding processes of legal change." (ibid:10)

For the issue of legal positivism to be in some way clarified we need, I suggest to move away from the abstractions of theoretical jurisprudence, and taking a lead from sociological studies of science look at the actual situations of law as practised by legal practitioners, something that our descriptions of the previous chapters can illuminate. Since much of the theoretical debate, and the justificatory notions expressed by Cotterrell relate to the application of rules we will look at these initially.

5.2b Positivism and Legal Decision Making.

The idea of legal activity as being the rational application of rules is central to law's understanding of itself. Although it would be going too far to say that legal reasoning believes itself based wholly on deductive reasoning, deductive reasoning is seen by many as what gives legal reasoning its legal character. This view of legal reasoning adopts a logic of rule-application which is positivist in nature and which can be described as:

$$R \text{ (rule)} + F \text{ (facts)} = C \text{ (Conclusion)}$$

or, as MacCormick (1995:x) elaborates:

"Rules are hypothetical normative propositions, stipulating that if certain circumstances (herein after, certain 'operative facts') obtain, then certain consequences are to (or 'must' or 'ought to') follow or be implemented."

Although legal decision-makers may have to adjudicate over competing versions of facts or circumstances, but that notwithstanding, the model is as simple as above. Reasoning from these rules can be problematic however, especially when the rules are indeterminate for application to particular facts or circumstances. When this occurs the model of legal reasoning needs further elaboration.

5.2c Rule, Objectivity and Decision making.

If we look at Case Six, we have here a case which I suggest that the legal positivists would see as a good clear example of objective legal decision making. The essential formulation that the panel decide upon is the following:

4 pm2 :no I would refuse it because I don't think that a fee paying client
5 of moderate means bearing in mind the quantum of the claim
6 would would proceed with it (0.4) unless of course an offer was-

This would seem to fit the model mentioned above, where: Rule + Facts = Conclusion, although the actual formulation of panel member two is delivered as: "I would refuse it" (**Conclusion**), justified in terms of "I don't think that a fee paying client of moderate means bearing in mind the quantum would proceed with it" (**Fact** or at least "**Fact**"), based upon the principle that: "...a grant of legal aid will not be justifiable: ... (b)... if time and resources are used up by cases which would not be pursued in the absence of legal aid because the applicant, were he/she a person of moderate means, would not have paid privately for the proceedings;" (Legal Aid Handbook 1995:68-69) (**Rule**). The rule is not made explicit as a separate statement but is, I suggest, implicit in

panel member two's statement.

In Case Seven, again we get the decision making done in the manner of conclusion first:

- 12 pm1 :grant limited to the close of (proceedings?) (.)
13 pm? : [ummm
14 ch :yeah weell I'd grant to close of pleadings (2.0)
15 pm2 :I would say counsel's opinion (.)
16 pm3 :no I think counsel's opinion as well (.)
17 pm2 : [mmm yeah (0.4)

Although there is initially some disagreement as to the exact nature of the conclusion, the panel do suggest the conclusion of the decision making process first. However, the Fact and Rule aspects of the positivist equation are not so obvious:

- 19 ch :seems to me that (.) erh (.) its a (.) fairly good (0.2) good claim
20 that she's got (.) and I (0.2) you won't get an opinion better than
21 (solicitors?) letter will you (.)
22 ? :(unclear)
23 pm1 : [there has been some more recent cases hasn't there
24 pm3 : [well there's (.)
25 nineteen seventy one (.)
26 ch :there are a lot of cases (.) err
27 pm1 : [yes there are (6.0)
28 pm2 :it's obviously not a very big case anyway and it may be th that if
29 if it (.) it might even be a case of (0.2) the insurance company
30 could be persuaded to settle before er (.) proceedings have
31 started
32 ch : [ummh (4.0)
33 cl :right I'll bring her back then (.)
34 ch :mmm (16.0)

The Chair (lines 19 to 21) believes that the claim is a fairly good one, but seems to rely on the appellants letter from counsel as evidence for this, but does not articulate either facts or rules. Over the next couple of turns (lines 23 to 27), panel members one and two and the chair talk about previous cases which, can be seen to be an articulation of precedence. But, articulation of facts and rules

does not seem to be evident in an explicit form, although it must be borne in mind that the previous phase of the tribunal will have also dealt with some of these issues. Nevertheless, in terms of legal decision making the positivist model does not seem to be evident, in fact it is panel member two's (lines 28 to 31) comments as to the possibility that the case may not come to court that is the final statement of the panel. However, this does not deter the clerk from seeing a valid decision having been made (line 33)

Case Five Phase Three differs from the first two in that the conclusion of the decision making (in terms of the equation) does not come at the beginning, instead, the beginning of 'phase' three deals with attempting to clarify the rules relating to the case (lines 3 to 9 below).

3 pm1 :how (did you claim for the) (unclear) (1.0)
 4 pm2 :I understand the point about the fourteen point (.) I eh (.)
 5 (unclear)
 6 pm1 : [I think I got to grips with it eventually but (.)
 7 ch :what they are supposed to for a for a (.) I can't give you a
 8 statutory reference for it (.) what they are supposed to do for a (.)
 9 a fourteen year old who's (.) statemented (.) but it's eh (.)
 10 pm2 :but but it's don't before or after birthday it seems here that they -
 11 ch : [no
 12 pm2 :-haven't done it? (.)

Following this they attempt to deal with the facts of the case (line 9 to 12 above). But the crucial piece of information in the decision making process seems to be, the parental concerns of the mother (lines 21 to 24 below).

21 pm1 :what she's concerned about is that if he is (.) removed from this
 22 present school he's got nowhere to go (.)
 23 ch :ummh (.)
 24 pm2 :well I can understand that (0.6)
 25 ch :and he's (.) I mean this is a common concern with many children
 26 who are perfectly normal who in the maintained sector if they are
 27 chucked out of (.) sufficient schools and (unclear) (0.8) the statute
 28 sez that where you have a child of special educational needs (.) the
 29 council has a duty to provide for those needs and then (.) and that
 30 that's their best point which (.) they're not
 31 pm1 : [he seemed to gloss over

Though the chair then generalises this point to parents in similar situations (lines 25 to 27), he then associates the case at hand with a specific legal statute (lines 27 to 29), but notes that this is not the legal point on which the appellants solicitor is asking them to evaluate the case (lines 29 and 30). A fact which is confirmed by panel member one (lines 31 and 32). It is immediately following this though that the decision to grant (conclusion of the equation) the case is suggested.

That this decision is not based upon "rules", however, is illustrated by the reaction of the chair (lines 41 to 44 below).

41 ch : [if you all to the library and get the book (.) you can all read
42 it and come to some decisions on it [tapping a large volume of
43 apparent statutes] (.) can't we (.) I mean I did that (0.2) (inhale)
44 okay (.) how about you (.)

The rules he seems to be indicating are the statutory rules written in the text he has at hand. However, this awareness of deviance from a rule based decision making model does not prevent him carrying on with the tribunal process (line 44). This case is interesting as it seems evident that the tribunal members are not following the rational decision making model outlined above. The issue for us here is whether this case becomes an instance of non-legal subjective decision making not following the rules, or a case of objectivity and rule following but in the Wittgensteinian and ethnomethodological sense of situated activity. The first thing to note here is that it does not get treated as problematically non-legal by the panel members or the clerk, and the chair goes on to provide a final conclusion to the decision making process.

If we decide that the case is legitimate, which we must when our criteria are that it is attended to as such by the panel members themselves, it would seem to indicate that the issue of objectivity in legal decision making, as something dependant on rule following (positivists), or as an impossibility (relativists), needs to be re-evaluated in light of a respecification of what

objectivity and rationality in relation to rule following actually means. A re-specification that highlights the situated nature of any evaluation and decision-making.

5.2d Ethnomethodology and Decision Making.

It is not being suggested that these observations on the decision-making of Legal Aid Tribunal members is unique, or that it has only just come to light that such activities occur within ethnomethodology there are a number of studies that draw attention to this phenomenon. In the previous chapter we noted that of Zimmerman (1971), and in Chapter Three in the discussion of the documentary method we noted Garfinkel's study 'Some Rules of Correct Decision Making that Jurors Respect' (1967 104-115) where Garfinkel observed on Jurors decisions making and noted that "jurors did not have an understanding of the conditions that defined a correct decision until the decision was made" (ibid:114) and that jurors were:

"...preoccupied with the problem of assigning outcomes their legitimate history than with the question of deciding before the actual occasion of choice the conditions under which one, among a set of alternative possible courses of action will be elected." (ibid:114)

We noted how this would make any model of linear decision making difficult to sustain. Another study by Garfinkel (1967b) which also shed light on the same issue is study of the practical reasoning of workers at the Los Angeles Suicide Prevention Centre (SPC), unfortunately no cases or specific cases are described, but what he states supports his comments on the work of jurors. He notes that the decision-making involved features of practical inquiries that were encountered in other situations (ibid:172) and notes:

"...for the practical decider, the actual occasion as a phenomenon in its own right exercised overwhelming priority and the rules or theories of decision-making were without exception subordinated in order to assess

the rational features of the occasion rather than those of the rules." (ibid.)

Garfinkel notes that enquiries to necessarily occur in a step-like fashion, and that: "Viewed with respect to the practices for making it happen, a routine inquiry is not one accomplished by rules." (ibid:174) The decision-making practices and concerns that Garfinkel describes as the concerns of the SPC members in deciding upon cases of suicide could equally well be applied to those of the tribunal members:

"SPCer's must accomplish that decidability by considering the 'this's': They have to start with *this* much; *this* sight; *this* note; *this* collection of whatever is at hand. And *whatever* is there is good enough in the sense that whatever is there not only *will* but *does*. One makes whatever is there do." (ibid:177)

Although, at least in the case of attended tribunals, the tribunal panel members get to talk to the main party concerned, but in the unattended tribunal there is a sense in which the LAB documents etc be seen as equivalent to the SPCer's 'body on a slab', The SPCer's see themselves as scientific, and as Garfinkel notes "their inquiries are made recognizable to members as scientifically adequate for all practical purposes." (ibid:183) In the same way the tribunal pane members' decision will be seen by them and their colleagues as both legal and positivist 'for all practical purposes'.

Whilst we have seen the practices that decision makers engage in during Legal Aid Tribunals and that they are similar observations to those which have been made by Garfinkel and other, it is the case that they are just descriptions of similar cases. However, while more descriptions do not for ethnomethodology provide for the warrantability of that or any other description, they do display other instances of that practice in action. This may in itself be enough justification for ethnomethodological research, however, as we noted above, our aim in this chapter is to investigate the 'epistopic' of which this tribunal decision making is an instance, legal decision making see 'for all

practical purposes' as legal positivist in nature. We have already looked at the 'theoretical' aspects of legal positivism as they are discussed by commentators, in the following section we will try and 'unravel' this further with reference to the 'sociology of science'.

5.3 Section Three - Legal Positivism and the Sociology of Science.

As has been noted above a charge against the positivist philosophy of law has been that it:

"..ignores the role of values in law and the way law is established in interpretation, that in treating rules as the given data of law it assumes a certainty and clarity in rules that is by no means apparent, that it can not cope with the complex relationship between rules and discretionary powers of officials in legal regulation." (Cotterrell 1992:10)

Implicit in this critique is that law, in its widest sense is, in practice, different from the idealised versions portrayed by its positivist philosophy. For Cotterrell a positivist view of law becomes a problem when it compartmentalises knowledge and thus becomes "a barrier to [the] recognition of the complexity of law as a sociological phenomenon" (ibid:14). However, the type of sociological phenomena which Cotterrell is talking about is of a specific type, a largely abstract macro phenomenon. Though as we have already seen, Cotterrell believes that practising lawyers address the law in a different manner from the philosopher and theorist of law. This position is not dissimilar from findings reached in the sociology of science, in that it is reacting against the notion that practising legal decision makers stick to a more rigid interpretation of the law dependent of theoretical and philosophical considerations.

5.3a The Sociology of Scientific Knowledge.

Until relatively recently scientific knowledge was regarded as objective and having an epistemological status beyond sociological analysis. However,

as noted above, Kuhn's (1970) studies of scientific revolutions brought this edifice into dispute. Kuhn's work can be said to have had a greater influence on the sociology of science than on the philosophy of science, especially in its implicit critique of Mertonian position of an accumulating scientific knowledge through conformity to institutional rules. This overturning of the Mertonian position is illustrated in Mulkay's analysis of the 'Velikovsky affair'²⁵, which broke the scientific "norms of universalism, organised scepticism and communism" and for Mulkay "re-affirm[ed] Kuhn's thesis of the rigidity, rather than the flexibility of the scientist in his attachment to paradigms and indicated that it is this rigidity rather than the Mertonian imperatives which guarantees the growth of knowledge." (Richards 1987:107)

Within this 'new' sociology of scientific knowledge, there are three trends, or schools which are prominent here: the 'strong programme', exemplified by David Bloor; social constructionism, exemplified by Bruno Latour and Steve Woolgar's 'Laboratory Life: The Social Construction of Scientific Facts' (1979); and the ethnomethodological studies inspired by Howard Garfinkel, for example Michael Lynch's 'Art and Artifact in Laboratory Science: A Study of Shop Work and Shop Talk in a Research Laboratory' (1985). These three trends have more in common than they have by way of dissimilarities, although there are significant differences between them (Knorr-Cetina and Mulkay 1983), and can be seen as a reaction to previous studies of science, as Lynch (1985) notes:

"Almost without exception, philosophical accounts, biographical stories, historical interpretations, and 'empirical studies' in the science studies literature address the practices of science as achievements to be explained in a language disengaged from any laboratory task at hand. It is not as though these accounts deny that science is accomplished in laboratory settings, but that they do not provide detailed access to the practical achievement of day-to-day inquiries. They instead give decontextualized versions of methodic production and logical reasoning, reconstructions

²⁵ Mulkay, M. J. (1972) *The Social Process of Innovation* London Macmillan.

of citation networks and historical lineages, after-the-fact interpretations of historical records, and abstracted 'social aspects' of science's institutional and administrative organization." (ibid:3)

My argument here is that is the position taken by the philosophy and theory of legal process by legal positivism when discussing law, has great similarities to that taken by positivism in science. That as such we will profit from looking at some of its insights.

It is not my aim in this chapter to focus on the sociology of science and describe its practices and findings. An excellent summary of the development of the sociology of science and its ethnomethodological critique, can be found in Lynch's (1993).²⁶ Rather the aim is to focus on some issues which have been raised here and which can be used to understand the debate about legal decision making and legal positivism. Nevertheless, there are a few issues worth noting to orientate the reader to the discussion

The 'new' sociological investigations of the practices of scientists do not, according to Michael Lynch (1982) display a single research strategy but what they do have in common is a 'relatively uniform' rejection of:

"(a) demarcation criteria separating science from 'common sense'; (b) rule-like logic and normative treatments of 'science-in-general'; (c) the primacy of logic and objective necessity in explaining scientific practice and scientific growth; and (d) identifications of science with one term in a dichotomous separation between objectivity/subjectivity, fact/construction, logic/rhetoric, or technical/social." (ibid:500)

Thus they can be seen as being anti-positivist. Lynch terms these studies as being 'critical' studies of science, but notes that some of them, unlike ethnomethodology, are largely unconcerned with the inherent properties of scientific practice in the laboratory. Instead, they focus on established methods

²⁶ See Lynch (1993) especially Chapters Two and Three.

in the natural sciences and perform retrospective social scientific analysis²⁷ upon these methods (ibid:500-501).²⁸ For ethnomethodological studies objectivity and critical practices are not to be found at some abstract level of theoretical discourse, but rather in the investigation of praxis. Ethnomethodology's anti-foundationalist stance, unlike the strong programme, does not see objectivity as an external narrative or discourse, but rather as a locally situated accomplishment. If we then apply this back to legal decision making, we can see that objective legal decision making becomes free of the textual problems that the literary analogies of Dworkin involve. Further, the subjectivity debate which gave rise to the fears of relativism often attributed also disappears.²⁹

To illustrate this and develop our discussion we return to the data we have previously looked at in the five cases of Sections Two and Three of Chapter Six. Data which, irrespective of whether or not a case was seen as constituting a possible example of a 'phase four' or of a foreshortening of the 'four phase process', in each case displayed the delivery of a decision by the panel.³⁰ Focusing on the rationality that is situationally attributed to the decision

²⁷ Interesting here is the that this social scientific method can be seen to replicate the same retrospective perspective methodology that the philosophy and history of science has employed to describe science.

²⁸ Lynch's paper is actually concerned to display how the practice of laboratory work incorporates a critical element, but that this critical aspect of the work does not rely upon social science methodology or interest. An important point made by Lynch, is that he believes that it is these in situ critical activities that practising scientists engage in, that "*make up* scientific progress, rather than a general theory *about* scientific progress." (Lynch 1982:511) The significance of this is that if correct, 'critical' studies of science focusing on 'histories' of science, are searching in the wrong place for explanations of 'scientific progress', even if , unlike Lakatos, they incorporate external socio-political and economic factors.

²⁹ These issues are worthy of more discussion than can be give here.

³⁰It could be assumed that the decision of the panel for the appellant would equate to: the granting of legal aid equalling good news, and the refusal of legal aid equalling bad news. There is quite a lot of literature analysis dealing with the issue of the delivery of good and bad news, especially 'bad news', and this

by the panel. This will also illuminate the second tenet of positivism that Jackson (1988), as noted above, locates in the work of Dworkin is that there is a necessary relationship between interpretation and decision making, with the former determines the latter. This issue is a divisive one for legal positivists and legal realists and hence a good candidate for some form of respecification. To do this, and to illustrate the potential of the insights of ethnomethodological studies of science, or studies of work, we will refer to a study of the relationship of the disciplines of maths and physics by Livingston (1993).

5.3b Proof Accounts in Mathematics and Physics.

Livingston, in 'The Disciplinarity of Knowledge at the Mathematics-Physics Interface' (1993), is concerned with scientific practice and in particular the nature of argumentation in physics and how it makes its discoveries knowable. In brief, the arguments of physics are usually presented as mathematical proofs of physical phenomena adjudicated by experimental results. However, as Livingston points out, the use of mathematics in physics is not guided by the requirements of mathematical theorem-proving, and that "physicists' argumentation is not mathematics; that physicists are not busy consulting mathematics to find out if their physics is correct" (ibid:369). For Livingston, to understand the use of mathematics in physics we need to understand the organisation of the practice of physics at the work site in the production of accounts.³¹ The issue of accounts is not straight forward though, as Livingston explains, an official account refers to two phenomena:

topic has also received a lot of attention from conversation analysis. See for example Clark and (1982), Rosen and Tesser (1970), Maynard (1989), Pomerantz (1978,1984). However, much of this assumes a 'good news' or 'bad news' dichotomy, a similar assumption of an externally valid rationality that I am arguing against here, rather than describing the delivery in its own terms.

³¹ As Feyerabend (1993:137) notes, Aristotle believed that mathematics does not deal with real things but contains abstractions.

"First, it refers to the use of general theories of proving to explain the adequacy of a proof. What makes a proof a proof, per one such theory, is that it can, at least in theory, be translated into a formal scheme of deductive inference." (ibid footnote:391-392)

This first form of account is the type which we have seen legal positivism at a theoretical level aspire to attend to, and the problems of these attempts have been illustrated. However, the type of account which Livingston is attending to in this text is the second type where "... a proof-account is a description of an organization of the practices of proving necessary for a proof." (ibid footnote:392) The importance of this being that:

"Once that organization of practice has been found, the adequacy of the proof-account appears retrospectively to be a self-exhibiting feature of the account. In that this transformation depends upon communally available skills of proving, a proof account is an 'official description' of a particular proof for the community of provers." (ibid footnote:392)

The communally available skills tied to proof-accounts at this second level, which we can see as the level of legal practice, differ from the skills for understanding proof accounts at the first level. Livingston does not want to tie these into disciplinary boundaries however, but instead ties them into gestalt shifts.

Livingston demonstrates his argument firstly by reference to the nature of the 'Chinese proof' of the Pythagorean theorem, in which proof is not provided by deductive inference, but by reference to the developing proof-account and the lived work of proving (ibid:373). What is important here is that notational detail, the practice of naming

"exhibits material detail around which proof-specific material - detail embedded in the course of work that makes up the proof - can be found....Therein, notation helps provide and exhibit a level of practice and material detail against which the distinctive structure of a proof can be exhibited." (ibid:374)

This role of notational detail is illustrated by Livingston via a second proof of

the Pythagorean theorem. However, the importance of this is that in both proof-accounts, Livingston shows that in themselves notational detail is not proof, but is only so when "it is attached to the work of proving that it is then seen to precisely describe" (ibid:376). Only when this occurs does proof arise from the background of figures and notation, and this requires a 'prover' to be seeking the proof to be discovered.

These practices of mathematics, the proof of theorems, however, are contrasted with the practices of physicists who Livingston shows are not engaged in the same theorizing of work, instead they are involved in "providing a gestalt description of the essential functional relationships between experimental results and physical reality" (ibid:378) The physical reality that physics refers to though, is not that of a shared common reality of some sort, but that of "a referable and referenced situation of inquiry" (ibid:379). Livingston illustrates such theorizing with reference to Richard Feynman's (1985) 'QED: The Strange Theory of Light and Matter'³². Livingston takes the readers through Feynman's proof for the sinusoidal pattern of the travel of photons through glass, and illustrates (from an implicit comparison with the previous mathematical proof of Pythagorean theory) that for non-physicists "the arguments of theoretical physics begin to look like a messy soup of rhetorical ploys, half-baked mathematics, and conjectural experimental facts" (ibid:388). Nevertheless, Feynman's proof account does succeed in showing what it intended, describing the photon reality of photon-glass interaction via a gestalt description of both the experiment and the photon. Whilst for the mathematician the mathematical formulae used are imprecise, Livingston notes that this is because the mathematicians are 'deluded' by the presence of such formulae into thinking that the physicists are attempting to prove their descriptions in the same mode of proof as mathematicians, while instead physicists are doing something quite different (ibid:389). The difference is that:

³² Richard Feynman (1985), 'QED: The Strange Theory of Light and Matter', Princeton, Princeton University Press.

"The mathematician uses the detail of the material argument to develop and articulate its descriptive precision and, therein, the materially exhibited 'gestalt' of reasoning that makes up the proof; the physicist uses the material detail and reasoning of an argument to find the developing descriptive gestalt offered by the horizontally perceived empirical object. The fine distinctions and detail used by the prover to organize and describe proving's work are used, in turn, by the physicist in a completely different way - to describe and distinguish aspects of an empirically unfolding empirical object." (ibid p390)

Because the formulae of mathematics and physics look the same, mathematicians 'wilfully' assume the mathematics they represent in the physicists' arguments are the same, and there is the same deception on behalf of physicists who construe their proofs in terms of mathematics. The result of this is to disengage the both the proofs and the objects from actual practices at the work-site of the disciplines (ibid:391).

This is disengagement is not a simple one however, as Feyerabend notes:

"Not only are facts and theories in constant disharmony, they are never as neatly separated as everyone makes them out to be. Methodological rules speak of 'theories', 'observations' and 'experimental results' as if they were well-defined objects whose properties are easy to evaluate and which are understood in the same way by all scientists." (Feyerabend 1993:51)

The way in which this connection is lost is to some extent also explained by Feyerabend when he states that:

"Modern science has developed mathematical structures which exceed anything that has existed so far in coherence generally and empirical success. But in order to achieve this miracle all the existing troubles had to be pushed into the *relation* between fact and theory, and had to be concealed by *ad hoc* hypotheses, *ad hoc* approximations and other procedures." (ibid:49)

Relating this back to the relationship between situated legal practice and legal theory, we may interpret legal practice not as consulting positivist legal

theory to see if its results are correct, but as 'referring' to the tenets of positivist legal theory for justificatory reasons at some epistemological level. The production of legal practice accounts instead seem to refer back to some notion of logical or positivist concept of proof, even if this would appear to be conflictory with their actual situated practices. Such referencing is not made explicitly, but does appear implicit in their proof accounts for the record or to the appellant. Reference may not be made to statutes or legal rules but possibly some form of precedence. The proof accounts following such referencing practices do, or can, appear as positivist proof accounts, and the accounts do infer deductive practices.

Similarly, legal practice proof accounts also seem to be retrospective and to rely upon 'agreed' communal skills and practices of legal practitioners. Skills which seem to involve a gestalt switch away from the 'intuitive' or commonsense reasoning inherent in their actual practices which would otherwise be seen to conflict with legal positivism.

Livingston notes that the skill for interpreting proof accounts at the scientific positivist deductive level, are separate from those at the communal level of proof accounts, those involved in the following of the developing gestalt of data interpretation - in the work of seeking of the developing proof. What appears to occur in situated legal practice proof accounts is that, the use made of theoretical legal positivism is similar to the use of mathematics in physics. It is used in the formal account, but it is not part of the developing gestalt needed for the developing proof account. This instead relies upon the ability to follow the developing gestalt, the situated communal practices of proof seeking by legal practitioners - although to non-practitioners they may appear in the way the mathematics of physics does to mathematicians. The situated legal practitioner proof account practices seem to rely not only on some aspects of legal commonsense, but also those of legal positivism. However, neither legal relativism or legal positivism can necessarily be used to assess the adequacy of the developing gestalt of the legal practitioner's proof accounts. Instead, the adequacy of the accounts can possibly only be assessed with

reference to their ability to develop the gestalt of proof accounts as they are accepted by the members present i.e. the tribunal panel, the clerk and the appellants.

Just as Livingston notes that mathematicians "wilfully" assume that physicists are construing their proofs in terms of mathematics, legal relativists may have a tendency to assume that legal practitioners are constructing their proofs, or at least their legitimation with regards to the tenets of legal positivism. Similarly, legal practitioners may construe their proofs with regards to some of the tenets of legal positivism, just as Livingston believes physicists do with regards to mathematics. This at least would seem to shed some light on the legal positivist and legal relativist debates on the adherence or not to legal positivism by legal practitioners, at least in relation to their accounts of their practices, not that they can be seen as wholly separate.

Further, some of the confusion may be explained as being due to what I believe to be legal practitioners implicit referencing of legal positivism and deductive reasoning in its proof accounts. The existence of a unresolved legal rationalist/legal realism debate is bound to lead to some theoretical/epistemological confusion, though not necessarily in the unfolding gestalt of their proof accounts - at least not for the legal practitioners themselves. For the legal practitioners much of the potential conflict between legal positivism and legal relativism epistemologies may be avoided in their proof-accounts through the use of ad hoc hypotheses, ad hoc approximations and other procedures. It is this situated nature of legal practitioner proof accounts, and decision-making processes, that displays the need for their respecification.

The aim of looking at this material was not just to understand the positivist/relativist debate which would seem relevant to the delivery of decisions in this ethnomethodological study of legal aid tribunals. Instead we can now return to look at the legal aid tribunal data and recognise that the accounts of the decisions at the decision deliveries will not necessarily be compatible with the decision making practices. Further, and this is significant

for the whole of the thesis, overt referencing of legal positivism in the literature on law does not necessarily need to reflect the actual practices of legal practitioners, there may be some similarity but the sociological studies of science literature would seem to indicate the lack of the necessity of an exact correspondence. Further, this does not imply that legal practice is incorrect, or that the literature on the legal discipline fatuous. Instead, the incomplete correspondence of theory and methodology to practice is a normal occurrence in 'human behaviour', and that this does not necessarily mean that the law, any more than science, is non-rational or non-existent, or its conclusions false, but it does inform us as to the workings of these disciplines.

5.3c Decision Proof Accounts in Legal a Aid Tribunal.

If we return back to the delivery of decision data in Case Two we can actually see that the panel members, and notably here the clerk, after the decision on a case has been made, discussing on how this decision is to be formulated. The formulation is for both the delivery of the decision to the appellant, and for the official documentation that is to stand on behalf of decision making by the panel, and their interaction with the appellant.

5	pm1	:h h h h [exhale] it's very borderline on liable a think (.) a- ?
6		: [hmm]
7	pm1	:-generous judge might say (yeah?) (1.0)
8	cl	:would you advise a private paying client (0.6) mmuh (5.0)
9	ch?	:(unclear)
10	cl	:dismissed on on the fee paying client test (.)
11	??	:[short unclear informal sounding talk by by panel members]
12	cl	:em our our usual standard reasons sez something like "in view of
13		thee em (0.4) likely cost of the proceedings the modest amount of
14		the claim and thee (.) doubts as to the liability a fee paying client
15		of moderate means would not be advised to pursue the matter (.)
16	ch	:thankyou (.)
17	cl	:that's alright (.) we'll get him back in shall we (.)

In this case we see that the process by which the decision was made is

one made from a position of uncertainty, even with the possibility of award in the appeal in favour of the appellant (lines 5 and 7). This uncertainty has led to the clerk being involved in 'directing' the panel (line 8) and helping decide the reason for the refusal (line 10). Once the decision has been made the chair has to deliver this to the appellant as a formal decision with an account of the reasons for the refusal. During the talk following the clerks pronouncement of the decision of the panel, which although unclear, seems to contain a question to the clerk (line 11) as to the delivery of the decision. The clerk responds by telling the chair the standard account given in such cases (lines 12 to 15). This formulation seems to be what the clerk, who has to record the decision and send written confirmation to the appellant and their solicitor, produce as an account of the decision making process of the tribunal. This is a more rationalised account of the reasons for the refusal than the process by which it was obtained.

If we see this as a proof-account, we can see that is presented as a rational and logical set of procedures which, if somewhat succinctly, moves from the evidence produced for the appeal to the decision. It is not necessarily in this instance, a misrepresentation for the reasons for the refusal of legal aid, but as a representation of the practices by which it was obtained it is not a very good representation. This also highlights some of the problems of looking at official accounts of practices and trying read back from them to the actual process that were involved *in situ*.

- 22 ch :my colleagues and I have (.) considered the papers and we've also
 23 (0.2) looked at they em (0.2) photos you've actually sent in in
 24 addition (0.2) erm a have to tell you (.) that we have decided
 25 against the appeal (0.2) erm (.) we say that erm (.) our reasons for
 26 doing so is that (.) erm as far as we can judge from the size of
 27 the claim it is not a large claim (0.2) it is a difficult matter of
 28 liability (0.2) and you look at (.) that (.) erm it would be (0.4)
 29 erm it would be very problematic as to whether (.) you would
 30 succeed in that claim on liability (.) and er (0.2) applying what we
 31 call the fee paying client test (.) if you were (.) paying your self
 32 (.) if you were not legally aided would you put your own money-
 33 ap : [yeah
 34 ch :-into embarking on this litigation (0.2) would you advise your

35 client to do it the answer would be (.) from us no (.) we wouldn't
36 (.) so (.) erm (.) am sorry that eh (.) the decision's gone against
37 you but it's gone (.) against you on those (.) three points (.) ap
38 :yeah (.)

If we look at the delivery of this case to the appellant we can see how the official account of the decision has become incorporated into the delivery of the decision to the appellant. Here the chair goes into greater detail, referencing the practices of looking at the documents they had and the photographs that the appellant brought to the tribunal. The account is presenting a rational process deliberation and the application of rules to the evidence presented, and resulting in a coherent decision by the panel. That it is adequate as a proof account is indicated by the willingness of the appellant to accept it (lines 33 and 38). The delivery of the account and its content develop as gestalt of legal rationality which the appellant has followed and can accept as an adequate account of legal decision making. We should not assume that this is some sort of cynical activity on behalf of either the chair, or earlier, the clerk, it is instead what proof accounts are routinely present as, an accepted by a large community of legal professional and ordinary citizens. Sometimes accounts are not accepted and may be challenge by receivers, but this is either due to such accounts being not well constructed, or the validity of such accounts not being accepted, which could be for a number of reasons.

We can see from just the five cases of the delivery of tribunal decisions in this thesis, that they can variably considerably in their delivery and content. Decisions that might be more favourable to the appellant may not be as complex in their proof accounts as they may not seem too necessary either by the deliver or recipient. However, the proof account by the clerk for the necessary official documentation is likely on such occasions to be more sophisticated than that made by the chair to the appellant.

5.4 Chapter Discussion.

Michael Lynch (1983) notes that many epistemological issues have now become topics for empirical study, but that one of the results of such research has been a scepticism as towards these epistemological topics. Wittgenstein has been used by many to justify this scepticism in that he illustrated how logic and mathematical rules were the result of communal consensus (1993:161). This critique of the most 'objective' area of the philosophic-scientific disciplines has lead to the scepticism of the actual objectivity of all the natural sciences. Lynch, however, argues that the adoption of scepticism is contrary to Wittgenstein's writings and that rather than epistemological topics becoming issues for sociological explanation, they are phenomenon for ethnomethodological description (ibid:162).

Rule following for Wittgenstein is not open to an open interpretation separate from communal practices, but is contextualised by regularities in common behaviour (ibid:167). So although there are no unambiguous rules in mathematics, an issue which has led many to scepticism, there are rules of social convention which direct the interpretation of such mathematical rules.³³ Rather than abandoning the notion of rule following as dependent in any way upon the relationship between the rule and the action related to it, such as the strong programme does in its reliance on socio-historical factors to understand practice, we should examine the 'grammar'. Wittgenstein is to be understood as not to be concerned with displaying the relativism of mathematics and rule-following, but to be concerned to understand what nature of mathematical objectivity is (Ibid:171). This is not to claim that mathematics is transcendental, but, I suggest, to respecify the nature of objectivity - here we may assume

³³ As Lynch notes: "What holds for rules can also be said to hold for theories in the natural sciences: They are underdetermined by facts, since no theory can be supported unequivocally by a finite collection of experimental results. Therefore, if consensus is reached on a theory, it is not explained by facts alone but by the social conventions and common institutions in a community of scientists." (ibid:168)

objectivity to be constituted as rule following. [these rules being rules of procedure]

Lynch, discussing Norman Malcolm's reading of Wittgenstein, quotes Malcolm interpreting Wittgenstein as meaning that "a rule does not determine anything except in a setting of quiet agreement" (ibid p173).³⁴ Lynch expands on this and states:

"When we follow a rule we do not 'interpret' it, as though its meaning were fully contained in an abstract formulation. We act 'blindly', and we show our understanding by acting accordingly and not by formulating a discursive interpretation. Of course, it is possible to misinterpret a rule, and we do sometimes wonder what the rules are and how we apply them in a particular situation. But such occasions do not justify a general position of rule scepticism, nor do they suggest that in the normal case we interpret rules in order to use them in our actions." (Ibid p174)

If we then apply this to our understanding of rule following in legal decision, making we will see that instances of decision making that do not attend to the statutory rules explicitly, do not be definition mean non-legal forms of subjective evaluation have been adopted, and that objectivity has been sacrificed on the alter of common-sense evaluation. Rather, it should lead us to re-evaluate the nature of objective legal decision-making within the positivist/relativist debate. Though it is important to note that this does not mean that we can invoke rules again as being determinative of legal decision-making actions, since as (Lynch 1994:144) reminds us 'objectivity' is a vernacular achievement.

³⁴ The agreement being talked about here is not an agreement "of opinions", but rather an agreement "in form of life". Lynch notes that "Agreement in form of life is established in and through the coherence of our activities... there is not time out from such agreement...", but that "to describe this consensus and to specify its role in the activity is not to isolate a causal factor." (Lynch 1993 p178)

Chapter Six - The Use of Texts in Tribunals.

"Given a future, any future, that is known in a definite way, the alternative paths to actualize the future state as a set of stepwise operations upon some beginning present state are characteristically sketchy, incoherent, and unelaborated. Again it is necessary to stress the difference between an inventory of available procedures - investigators can talk about these quite definitely and clearly - and the deliberately programmed stepwise procedures, a set of pre-decided 'what-to-do-in-case-of' strategies for the manipulation of a succession of actual present states of affairs *in their course*. In actual practices such a programme is characteristically an unelaborated one."

Garfinkel 'Studies in Ethnomethodology' 1967a:97-98

In this chapter we will look at the specific issue of document use. In the first section we will look in some detail at the studies of D. E. Smith (1990a, 1990b), A. W. McHoul (1978a, 1978b, 1980, 1982a, 1982b), and E. Livingston (1995), before finishing with a study by M. Lynch and D. Bogen (1996). It will be suggested through a critiques of these studies that we must investigate the use of texts in the context of their use, and that doing so must recognise the uniqueness of such occasions. That although the texts in a sense drive the tribunal procedure, that procedure is not determined in advance. The course of action the tribunal members take instead being locally determined and that this is hearably so.

In the second section we will focus on the documentation as constituting a 'representation', and consider what is the textual phenomenon or phenomena that are actually being dealt with by the tribunal panel. It will be suggested that the documents may provide for more than one representation or phenomenon, a fact that has potential consequences for the resolution of ambiguities in interpretation. Some of these complexities will be illustrated from data in which the appellant/or and their legal representative is present. Our focus will be on the use of documentation, especially how the represented 'meaning' is negotiated between the parties involved in the situated activities of the tribunal process.

It will be suggested the documentation which is presented to the Legal

Aid tribunal would seem to be representations of three individual, but connected phenomena:

- a. A past event that it is claimed is in need of legal adjudication.
- b. A current event, a case constituting an appeal against the refusal of legal aid.
- c. A future event, a case that will potentially end up being adjudicated in a court of law.

It will be suggested that the case documents may involve representations all of these, although it must be remembered that they are doing all these in the temporal present of a legal aid tribunal, and that we can thus see that role that the documents have is a complicated one. This complicated function of the documentary representations would seem to explain why attended tribunal cases are preferred by the tribunal panel over unattended case, that being for ease of understanding and interpretation of the phenomena.

Finally, it will be suggested that sociological research that takes texts as having a singular representational meaning that can be read-off by the analyst out of the context of their usage, such as is the case with some of the studies critiqued in the first section of this chapter, may be ignoring the complexities of practices and consequences of situated documentary usage.

6.1 Documents Research.

In this section we shall look at some research on document use from socio-legal and bureaucratic research before focusing on ethnomethodologically inspired research. In the latter part we shall deal with the work of commentators in some depth so as a basis from which this thesis can develop.

A good illustration of the role of texts in Western law can be illustrated by Sally Falk Moore (1992), she looked at the problems associated with the imposition of Western style organisation onto African legal systems by British colonial officers in Tanganyika at the beginning of this century. Moore notes that the colonial plans were problematic because Western legal systems have a general underlying reliance on written records, which was not the case with

African system. The key point for Moore is that there is a "considerable difference between legal systems that are fundamentally oral and legal systems predicated on writing everything down....Used in law, writing is a technique that affects substance" (ibid:26).

Although written documents have long been a focus of classical legal research, the focus of research was with regards to texts standing unproblematically as either records of court events, or as unproblematic representations of 'real world' events. This is to a large extent still true of contemporary socio-legal research, but there are examples of research which focus on the role of documents in on-going activities of legal practice. An example of such research is Silbey (1980-81) who employs document analysis and case study to focus on complaint processing in the office of consumer protection of the Massachusetts Attorney General. Silbey makes some good observations on the role of documents in legal activity, for instance she notes that:

"Although statutes set theoretical limits to official action, they cannot describe how things are done within those limits....individual law enforcement officers become agents of clarification and elaboration of their own authorizing mandate....Second, in the process of working out mandates, organizations modify the goals they were designed to serve... Record keeping imposes order upon this endless process....This is a conception of law as a situationally defined process." (ibid:881)

The key aspect of this social situated nature of law and document use is that it suggests that we should not try to look at events texts report, using the texts as representations of events to be adjudicated upon, but instead upon the use of texts themselves,¹ A useful text in this regard is Raffel (1979), whose starting point, only to discredit it, is that records are meant to have some relation to the event they record and that we are "apparently somehow able to move from thinking about the record to thinking about what the record is

¹ Two studies of interest here are Wheeler (1969) and Zimmerman (1969) both of which look at the issue of record keeping in American society.

'about'" (ibid:4). The question being how does the record allow access to the event. In many cases, the record-event link is assumed rather than explicated so as to permit inferences about the 'real world', however uncertain this may be. The record is meant to be a reflection not an independent thing, not itself an event since its authority lies in its relation to an event. Raffel believes significance lies in the belief that only the present is knowable and "the record thus makes the present permanent and eternalizes the event. The event speaks for ever through the record, the record being identical with the event" (ibid:43-44).² Thus, the past is transformed into the formerly present by the record. Interestingly, Raffel suggests a concern with bias to be misleading as "when records are seen in terms of the grounds which make them possible, it is no longer adequate to state that records reflect, whether accurately or inaccurately, the givens of the real world, because the real world itself comes to be shaped by the very idea of recording it" (ibid:48). Thus, assumptions that:

"The proper statement of the relationship of records to the world is that, in so far as one wants to see records as corresponding to the world, one must treat the world as revealing or presenting what *must* be said about it." (ibid:64)

implying that:

"(1) The world must be formulated as telling one what must be said about it for short notes to be able to 'represent' long periods of time" (ibid:67), "(2) Because it is events that speak, it is even possible for a record to say nothing and yet be adequate....the absence of anything can be a topic of record" (ibid:68), "(3)... A narrative is possible in so far as things (events) are thought to disclose themselves. Therefore, speech can be thought of not as adding some thing but as repeating what is there. Speech can repeat a thing if a speech need not be thought of as itself a thing but can be 'about' other things. This view of speech is accomplished

² Benson and Drew (1978:90) in an examination of data from the Scarman Tribunal have shown that a record whose authority relies on correct procedures of production can have its 'facticity' challenged on account of incorrect procedures being followed.

by ridding speech of any contribution except the contribution of making a record." (ibid:70)

This view of texts, as Raffel is well aware, is problematic in light of post-Wittgensteinian language philosophy and research into document use must reflect this, as Raffel is well aware.³ The same consideration applies to the analysis of documents. If one does not have some understanding of the contexts in which they are written and read and the relevant purposes of writers and readers, then one cannot evaluate their significance.⁴ Records, reports or whatever are not literal descriptions of some reality: they are rather, accounts which organize and, in some sense, create the reality which they describe, within the constraints of some particular occasion on which they are read (ibid:21).

This aspect of textual documents, their supposed representations of an external reality is not a insignificant assumption and the gravity of its influence is displayed by Chau (1979) in his paper 'Democracy as a Textual Accomplishment'. Chau's analysis is of the Preliminary Report of the Canadian Royal Commission on Bilingualism and Biculturalism 1965, of which he claims opinions expressed within had been "abstracted from their original contexts, trimmed and then recontextualized in the report" (ibid:544). The report, states Chau, produces opinions and makes them available for inspection and in doing so claims objectivity and facticity for the report. Chau draws attention to "the way the opinions are used to formulate a speaker's rather than a reporter's descriptive account of the social condition" (ibid:546). The importance of the 'deception' being that such commissions are used in democracies to report

³ Sajo (1981) in a study of Hungarian State bureaucracy and legal rule following, notes how regulations become the method of objectification through the lack of any accessible way of getting from the text to the events they report. Sajo points out that this creates a world in which "the document plays the role of the objective of work while the client is treated as a thing, or, in fact, as the symbol of things within the document" (ibid:76).

⁴ This issue of context is one which is relevant to the earlier discussion of the use of data segments and is illuminated by that discussion.

'public opinion' on a particular social situation and to recommend appropriate state activities, the use of decontextualised opinions thus allowing the State to display its democratic commitment. Chau describes how dissenting and minority voices against the State are presented in such a manner as to be read as individual unique items not as collective speech, yet at the same time their reporting "serves to display the Commissioner's democratic claim of hearing from all sides" (ibid:546). Chau notes that this is only one textual practice employed by the State in democracies, and his aim is to display the value of such analysis, stating: "The strong aim of such analysis should be that of specifying how these and other practices are essential features of some segment of ideological production and reproduction" (ibid:547). Chau stresses the utility of ethnomethodology in such an approach and concludes that:

"The present analysis...attempts to raise the document itself as the analytic object and seeks to disclose how it is constituted through a series of methodological practices, which reporters use to solve the practical problems of doing reporting. It demonstrates that the descriptive report is through and through a practical accomplishment filled with the reporter's crucial interpretive and judgemental decisions. It also demonstrates how the ostensibly democratic status of official documents, as a genre, is suspect because such documents do not, and cannot treat all opinions as equally deserving serious attention. To treat all opinions equally renders a conclusive description of *the* social condition problematic." (ibid:548)

Chau is not the only researcher who has attempted to apply ethnomethodology to textual analysis, but as we shall see below there are common problems which many of these attempts create. Chau, it is worth noting, like Green (1983) in his study 'Knowing the Poor: A Case-study in Textual Reality Construction', uses historical texts on which to base research. Green too claims inspiration from ethnomethodology in the examination of the practices of knowledge and reality construction, though acknowledges a difference in that:

"...whereas ethnomethodology has programmatically focused on situated

interaction and speech, the present work takes writing as its theoretical object, treating it as a distinct locus of what Harold Garfinkel calls accounting devices." (ibid:ix)

Green is concerned with the use of genre by intellectual communities to allow written artifacts to become analyzable, that these reproduce community boundaries at the textual level. What is interesting is that Green believes this sort of focus will prevent textual analysis "degenerating into purely technical, linguistic analyses" (ibid:ix). Green realises that Garfinkel's documentary method is not a method for analysing documents but is rather concerned with situated activities, something Chau overlooks. Documents may be resources for Garfinkel, not the topics of analysis *per se*.⁵ Green notes that his project is more like that of Dorothy E. Smith (whom we shall look at in some detail) whose concern is with documentary reality, although he is quite critical of her approach. Of his own analysis, which appears as a more sophisticated version of what Chau was aiming for, Green states:

"My argument is that all such themes [alienation, anomie, community, intersubjective fusion] are all experientially grounded in the passage from situated to textual reality construction; a passage occurring as the separative negation of situated fusion in being brought to writing which then allows for looking back and looking below to what has been negated. The problem I wish to address is how that negation is decisively accomplished so as to leave nothing behind but a factual report." (ibid:21)

Whilst Green's project is an interesting form of text analysis, with regards to the focus of this thesis, legal aid tribunals, it moves, although admittedly recognising it does so, away from situated activity using texts - where Garfinkel remains - and into textual practices. In fact, Green is interested in the negation

⁵ Green (1983:16) correctly notes that Garfinkel does not explore the "inner horizons of documents as constitutive accomplishments in writing, because his sight is firmly fixed on situated accomplishments. This is the ethnomethodological bias, its founding problematic, which predetermines the significance of documents as one of usage for situated reality construction."

of situated activity and reality in factual reportage, and how this is achieved.⁶

An alternative form of text analysis influenced by ethnomethodological studies is where written texts are examined with a view to their reliance upon characteristics of spoken discourse. This approach to textual analysis is influenced by the conversation analytic perspective of ethnomethodology and suggests that "an adequate understanding of how texts are produced and responded to may remain elusive so long as the issue is pursued without making close comparative reference to how talk works" (Atkinson 1983:230). This position is based upon the supposed priority of spoken discourse in human history and in each individual's linguistic development, a stance which I believe both Ong (1982) and Olson (1984) seriously put into question. Although Atkinson (1984) does make a persuasive case for this transmission from verbal to textual in 'Our Masters' Voices', the use of verbal sound-bites from speeches into newspapers does not prove the case in terms of the primacy of orality or literacy in society.

Mulkay (1985a), another conversation analytic influenced user of text analysis, focuses on written letters which provide an obvious similarity to turn-taking in conversation in their basic usage. Though as Mulkay notes:

⁶ Green's work is extremely interesting in relation to the production of research reports:

"Every text presenting itself as a representation of social reality will include references to at least these separations (say as discussions of precaution against bias, sensitivity over description versus prescription, the operationalization of concepts, the representative adequacy of particular data) and these will serve readers as indexical signs that the work under way is that of producing an external reality. The work is attributed only to the investigation behind the writing, however, and not at all to the writing being read, which is what factual inquiry must effectively come to. In Garfinkel's terminology, the self-reported research work of factual inquiries is a gloss on the separative work of the text whereby it not only takes the place of situated particulars but does so as their essential truth, there for the reading. Every factual social report moves from a displacement of situated reality towards its replacement by textual orderliness (towards that form of rational accountability), but in unmarked ways. This does not mean, however, that they are in any sense unremarkable...." (Green 1983:19)

"We can reasonably expect, therefore, that the findings of conversation analysis will be more directly applicable to epistolary texts than to other kinds of textual product which lack these features. Moreover, owing to these similarities between conversations and letters, the analysis of epistolary exchange may well feed back upon conversation analysis." (ibid:202)

Mulkay's analysis looks at 'the Perry letters'⁷ and utilises the conversation analysis of Anita Pomerantz (1984) in 'Agreeing and Disagreeing with Assessments: Some Features of Preferred and Dispreferred Turn Shapes'. Mulkay's conclusion is that:

"the concepts and propositions formulated by Pomerantz in relation to conversations have been shown to be equally relevant to the analysis of letters... it seems that we may have the beginnings of an empirically informed analytic framework which can cope with the organization of written as well as spoken discourse and the structure of both dialogue and monologue." (Mulkay 1985:225-226)

However, whilst the similarities to conversation seem obvious it is my opinion that they are essentially at a superficial level and tell us little about the use of texts in situated activity.⁸ Mulkay, I think, was rather too optimistic about the possibilities here and overlooks contextual aspects of orality and literature, and the centrality these must hold in any ethnomethodologically informed research.

So far in this section we have covered a number of issues relating to documents and their analysis, to clarify my position further on this we shall look at some commentators in more depth.

⁷ Eighty letters on a scientific debate instigated by a scientist whom Mulkay gives the pseudonym Professor Perry.

⁸ The dissertations for both my B.Sc. (hons) and M.A. both focused on a series of texts with a view to the turn-taking construction they employed, however my conclusion was that such an approach to texts was quite limited. In some ways it can be seen to suffer from some of the problems that I locate in the analysis of D. E. Smith (see below), especially the lack of any situated activity or temporal perspectives beyond those of the turn themselves.

6.1a Dorothy. E. Smith.

The work of Dorothy E. Smith is influential in the research on texts and social processes. Here I propose a brief review of her ideas and in particular, two of her empirical studies, focusing on the concerns of this thesis.⁹

Smith, in two volumes containing published and previously unpublished work, 'The Conceptual Practices of Power: A Feminist Sociology of Knowledge' (1990a) and 'Texts, Facts, and Femininity: Exploring the Relations of Ruling' (1990b)¹⁰ shows herself to be one of a number of figures to have drawn on ethnomethodology, and one of few to apply them towards textual interaction.¹¹ Smith does not consider herself, and is not considered by others, to be an ethnomethodologist, and she may be seen as yet another sociologist pointing out the limits of ethnomethodology, but in doing so she does come up with some interesting practices derived from those of ethnomethodology. Her work has four major themes and influences: Marxism, Ethnomethodology,

⁹ A fuller critique of Smith is available (Jenkins 1995).

¹⁰ Much of the work in the two texts has been previously published elsewhere, in their combined publication they are presented as two coherent wholes. I have argued elsewhere (Jenkins 1995) that Smith can be seen in these two volumes as presenting her work as representing a single 'coherent method', that of 'Institutional Ethnography' from 'The Everyday World as Problematic: A Feminist Sociology' (1987), and that due to the fact that most of the papers and empirical studies were carried out prior to the working out of this coherent method they fail to live up to this billing. Initially I worked with the earlier versions but re-read them when they were published in this new format, all references here will be to these collected editions. To an extent Smith has made changes to the original work in their re-presentation, and in some cases they are almost reinterpretations.

¹¹ In Chapter Four 'On Sociological Description: A Method from Marx' (1990b), which was originally published in *Human Studies* Vol 4 1981:313-337, Smith states her concern to be to explicate "our practices of doing, hearing, and reading descriptions to identify how these practices interpose between us and that of which we speak" (1990b:91) Significantly, these include the practices of the researcher as it is through these that for Smith we gain access to the practices of others.

Feminism, and Ideology, with the *a priori* position of the "fact" of women's oppression, and the avowed aim of the relief of that oppression.¹² Before looking at the empirical studies it is worth noting some aspects of Smith's relationship to ethnomethodology.

The importance of Garfinkel's ethnomethodology for Smith is that she credits Garfinkel with "the discovery of the text as a significant constituent of social relations" (1990b:211)¹³ - textually mediated social communication.¹⁴ This accreditation however, ignores for example Marx's 'The 18th Brumaire' which indicates the role of text in social relations.¹⁵

In looking at intentions of individuals, Smith, like ethnomethodology, believes we have to focus on their actions in events. Rather than pose an opposition between appearance and reality, Smith in Chapter Two 'The Ideological Practice of Sociology' (1990a)¹⁶ aims to keep her inquiry within the

¹² Sandra Harding (1991) epistemologically locates Smith as a Feminist Standpoint theorist where "The distinctive features of women's situation in a gender-stratified society are being used as resources in the new feminist research. It is these distinctive resources, which are not used by conventional researchers, that enable feminism to produce more accurate descriptions and theoretically richer explanations than does conventional research" (ibid:119). While this is undoubtedly Smith's aim, and I do not wish here to argue the epistemological positioning, I have to concur with Patricia Hill Collins who, in a review of 'The Conceptual Practices of Power' states: "After Smith's initial claims that women's standpoint can inform an alternative sociology, women as specific knowers drop from the analysis" (Collins 1991-92:270).

¹³ Smith indicates that she is referring to, and lists in her bibliography, Garfinkel's 'Suicide for all Practical Purposes' in 'Studies in Ethnomethodology' (Garfinkel 1967). However, no such chapter exists what Smith seems to be referring to is a chapter published in Roy Turner's (1974) 'Etnomethodology' by Garfinkel entitled 'Suicide, for all Practical Purposes' which is an excerpt from 'Studies in Ethnomethodology' (1967).

¹⁴ By text, Smith means both the inscribed words of symbols and its physical materiality both of which are produced by technical practices (footnote Smith 1990a:211-212).

¹⁵ My thanks to Martyn Hudson for this observation.

¹⁶ Originally published in Catalyst Vol 8:39-54.

'knower's experience' but also to develop an inquiry that "explores reaches beyond that experience that are already present in it but are inexplicable by remaining within the boundaries of experiencing" (ibid:54). Here we can see how Smith generally regards her relationship to ethnomethodology: she agrees with its 'position' but wants to 'move on'. This can be illustrated by her conception of 'social relations' in Chapter Six 'No One Commits Suicide: Textual Analyses of Ideological Practices' (1990a), in which she contrasts her position with ethnomethodology in relation to courtroom talk. It is worth quoting in full.

"...an ethnomethodologist might address a specific segment of courtroom talk, say, an interruption, as a general class of speech events, receiving the immediate setting of the courtroom as the temporal and spatial boundaries of the event. By contrast, the method of inquiry deployed here would treat the interruption as a feature of a social relation not fully present in the courtroom or to observation. Courtroom talk is directed towards the production of a formally warranted record of the proceedings, the record has a definite legal status and legal uses. Those responsible for it are the judge and the court recorder. The record is then available to lawyers and at a later stage for the purposes of making appeals and the like. Courtroom interruptions are handled in specialized ways that clarify what is said and who said what *for the record*. They take on a distinctive character in the context of social relations. Thus 'social relation' as an analytic device explores activities of a particular social setting or, as here, textual instances drawn into the analytic text, as articulated to social courses of action beyond the immediate time, place, and complement of people. 'Social relation' enables us to go from the moment of 'observation', in which the phenomenon arises for us in our here-and-now, to an analysis that discloses how it is organized by and articulated to foregoing and subsequent moments in a social relation." (ibid:150-151)

It might be said that the version of ethnomethodology which Smith refers to is that of conversation analysis, but I suggest that it is a central feature of all ethnomethodological analysis that is being condemned, the avoidance of theoretical ironicisation. Smith's position and implicit critique is worth noting as to what she sees as the limits of ethnomethodology's approach.

Smith's investigation are largely into the textual construction of reality.

Smith in Chapter Six 'Femininity as Discourse' (1990b)¹⁷ summarizes her position on texts as:

"Texts are situated in and structure social relations (extended courses of action) in which people are actively at work. Texts enter into and order courses of action and relations among individuals. The texts themselves have a material presence and are produced in an economic and social process which is part of a political economy. Textually mediated discourse is a distinctive feature of contemporary society existing as socially organized communicative and interpretive practices intersecting and structuring people's everyday worlds and contributing thereby to the organization of the social relations of the economy and of the political process." (ibid:162-163)

The issue here though is how is this to be investigated, and what are the limitations that we must adhere to. A key methodological issue since for Smith, we must not isolate texts from their practical usage but focus on "a lived world of ongoing social action organized textually" (ibid:163). For Smith texts fix meaning in a material form detaching them from their transitory construction and existence in on-going interaction, they speak in the absence of speakers.¹⁸ It is "the distinctive formation of social organization mediated by texts, their capacity to transcend the essentially transitory character of social processes and remain uniform across separate and diverse local settings [that] is key to their peculiar force (though that transcendence is itself an accomplishment of transitory social processes)" (ibid:211). Before moving on to her empirical studies it must be noted that Smith may be misguided when she thinks that texts remain uniform across setting, except in their basic physical appearance. I believe we will see that nothing else can be assumed to remain uniform. This is not to say though that texts are often assumed to remain uniform in content and 'meaning' by those who use them, but that this is itself a locally situated

¹⁷ Originally published in Leslie Roman and Linda Christian-Smith (eds) (1988:313-337), 'Becoming Feminine: The Politics of Popular Culture', London, Falmer Press.

¹⁸ This is an issue that will be taken up later in this chapter.

activity. Since in many ways it is the locally situated practices that Smith is hoping to reveal, though she does so with the view of a text as having a uniform 'nature' across time and space. We shall examine two of her case studies some depth.

In "'K" is Mentally Ill: The Anatomy of a Factual Account' (1990b)¹⁹ Smith "analyzes an interview which tells how K comes to be defined by her friends as mentally ill" (ibid:11), is concerned with non-formal accounts produced by family and friends and is probably Smith's most well known study.²⁰ The study arose from a student exercise set by Smith, and initially based on work of Kituse (1962), where students were required to interview people and then give a talk in class on their interviews. With one of the transcripts Smith believed that she could give a different reading of the interview, i.e. an account of freezing out in terms of Lemert, to the students version based upon Kituse.

To understand the method that Smith actually uses we have to realise that the student's account, which is Smith's phenomenon, is not an account of mental illness, but an account by a student of a respondent asked if they knew someone they thought was mentally ill. The account itself is mediated by the student who first of all gives a verbal presentation and subsequently submits a written account. Significantly, the interview was not taped, but written up after the event and hence subject to unknown 'editing'. In the 1990 version Smith recognizes the problems here in terms of accuracy, acknowledging that the respondent's account is directed by the interviewers question, and that the respondent selects aspects of events to bring to the foreground in her accounting when responding to the question. Smith also recognizes that the interviewer has

¹⁹ This paper was first published in German as 'K ist Geisteskrank. Die Anatomie eines Tatsachenberichtes' In 1976 in E. Weingarten, F. Sack, and J. N. Schenkein (eds) *Ethnomethodologie. Beiträge zu einer Soziologie des Alltagslebens*, Frankfurt: Suhrkamp. And in English as 'K is Mentally Ill: The Anatomy of a Factual Account' in *Sociology* 12 (1) 1978, :25-53.

²⁰ For a review of this paper from a discourse analysis perspective see Wooffitt (1992).

had to 'work up' the account after the event, and Smith herself having done some minor editing. But this does not matter to the extent that Smith is interested in the transcript as her data and phenomena not whether K was mentally ill or not (ibid:17).

For Smith it is the structure of the text that provides a set of instructions as how to read K's behaviour as that of someone becoming mentally ill. Smith believes that we are able/made to read the account as that of someone becoming mentally ill due to the ordering and schema of events, and that it is possible to "analyze this account to discover (in a preliminary way) the lineaments of the concept of mental illness" (ibid:16).

Smith acknowledges that there is always more than one possible version of events. Her interest is in how a version is authorized as what happened and what those authorization procedures are. For Smith, in the account of 'K' we are told from the outset that 'K' is mentally ill and so read the text as such being the case, suspending our disbelief. Then, the normative definitions in the account are those of others not 'K', 'K's voice and version are effectively silenced (ibid:24-25). Finally, facts are worked up and the proper procedures followed to establish something as effectively known: Firstly, direct observation, Angela, the interviewee and K's friend, is "forced" to recognise facts even though she does not wish to. Secondly, a succession of independent witness are provided whom Smith believes in reality may not be so unconnected (ibid:28). Thirdly, and related to the latter, that judgement of each independent witness is based on direct observation supposedly uncontaminated by the views of 'others', and that this is emphasized as the case.²¹

Smith believes that by being told that K is mentally ill at the beginning of the text we can see the account as a 'problem' to which we have been told the solution: "The problem presented by the account is not to find an answer to

²¹ It is important to note that both the second and third items here show that Smith is moving from her phenomenon - a text produced by a student - to talk about a reality behind the text, an illegitimate move by Smith's own recommendations.

the question 'what is wrong with K'?', but to find this collection of items as a proper puzzle to the solution 'becoming mentally ill'" (ibid:30). Smith does not seem to realise that because the remit of the students was to interview an individual who knew someone who was mentally ill, which is exactly what the student produces for Smith, that the phenomenon Smith is looking at is actually a textual response to a problem set by Smith herself. This does not invalidate it as a phenomena to be investigated but, as Smith's textual method informs us, a text is an abstraction and ideological if it is not grounded in the concept of an actuality but rather sociological theory. Since Smith's phenomenon is the text, and the text was produced under her instructions, she is looking at a phenomena she herself has largely determined.

This may seem a minor point but Smith's believes that her analysis has located a 'cutting out' process going on, at the end of which 'symptoms' are seen as 'illness' or 'disease' rather than as situationally dependent. Smith states "I have suggested that an alternative account of what happened is possible", but she does not realise that her own method does not allow her to treat her phenomenon in this way. Smith again goes back to the text as representing an actuality that can be regained, and suggest that in that actuality what was actually occurring was a 'cutting out' process. In effect Smith is taking an already ideological constructed text and reinterpreting the events, which on Smith's own methodological account, cannot relate back to any actuality, never mind reinterpret them in term of another theory, i.e. Lemert's. This is not to say Smith is wrong when she asserts that authorization rules lead the reader to side with the tellers version when situationally inadequate action by "K" occurs, and not search for other explanations.

By Smith's own methodology the paper is tragically flawed, nevertheless, it does allow us to see what Smith's phenomena for her method are, the practices of reading and accounts as representing an actuality but which are in fact an ideological representations in the form of a text. Unfortunately, Smith's account of the 'cutting out' provides an unintentional example of the production of an ideological account, the type of account that she criticizes in

the second study of hers we shall look at.

In 'No-One Commits Suicide: The Textual Analysis of Ideological Practices' (1990a)²² Smith suggests that we see the difference between 'everyday language discourse' and 'ideological discourse',²³ and attempts to show how an ideological reading can be made from a primary narrative, but again Smith breaks her own methodological guidelines. Using "Phyllis Knight's 'autobiographical biography' as told to and edited by her son Rolf Knight" (ibid:136), and for an interpretive ideology applies "assembling instructions....in a passage from a psychiatrist's account of depressive illness" (ibid:164). Smith argues that in applying the second text we discard important features of the original narrative that explain the behaviour which the ideological version does not allow for. However, while this is an interesting exercise, it cannot claim to represent a real phenomenon, i.e. not a naturally occurring phenomenon, as she has invented the example herself for the exercise. There is also possibly some question as to the status of the first text as a primary narrative of the mother, as it would seem to be that of the son.

In a second example, 'the case of Harriet', Smith contrasts a case history

²² This chapter, Chapter 6 in 'The Conceptual Practices of Power: A Feminist Sociology of Knowledge' (1990) along with Chapter 7 'Ideological Methods of Reading and Writing Texts: A Scrutiny of Quentin Bell's Account of Virginia Woolf's Suicide' (1990a) were originally published as 'No one Commits Suicide: Textual Analyses of ideological Practices' in *Human Studies* 1983, Vol. 6, 309-395.

²³ Smith makes the distinction between primary narratives that draw directly on experience, and ideologically ordered narratives, although she makes no claim for greater accuracy of one over the other. (1990a:157) The distinction is not well illustrated and seems weak, the main difference, apart from direct experience of the renderer, being that the primary narrative has no 'agenda' to attend to, but this seems unclear too. At the level of reading the contrast is given as being that, in the primary narrative "the readers interpretive work draws upon her own experience in articulating the tellers experience. This relation is expressed in such phrases as "I knew just how she felt", "Something just the same once happened to me"... "In contrast, the ideological form of narrative proceeds in a fashion that depends upon the reader's or hearer's grasp of the appropriate interpretive schema of the professional or other textual discourse" (ibid:162).

prepared by a psychiatrist for a formal clinical presentation with a version Smith has prepared herself from the same material as the psychiatrist had available i.e. case notes.²⁴ Smith describes the texts that she and the psychiatrist have used as: "Much of this, in various ways, originates in primary narrative or consists of primary narrative partially worked up into forms intending psychiatric schemata" (ibid:165). Smith attempts to show us how the ideological schema of the psychiatrist is applied to primary narratives. However, since Harriet herself is unlikely to have written any of the case notes, and that the case notes that are there are likely to have been made by a professional or as Smith herself would agree, someone attending to a professional schema. Therefore we would have to be 'generous' in accepting these as a 'primary narrative', especially one 'belonging to' the patient rather than an ideological narrative belonging to psychiatric medicine.

Smith proceeds to illustrate how she can provide an account from the same material, one that is more temporally orientated, in which she as a 'member' sees Harriet's case differently from the psychiatrist. Here Smith again appears to be claiming to be able to provide an account that is able to get back the original phenomena of the lived experience i.e. Harriet's behaviour, and claiming to give a 'truer' account from the case materials, contrary to her avowed methodology.

The problem here is that Smith has again produced a version which is not grounded in the naturally occurring actual activities of actual individuals, hence in this sense it may be seen as devoid of social relations, a key aspect of Smith's methodology. Secondly, she removes the psychiatrist report from its social relations as a formal clinical account whose intended reader and social relations were undoubtedly not that of a social researcher. Smith again seems to mistake the nature of her phenomena, and to have overlooked the importance of the locally situated nature of texts for her research method.

²⁴ Smith fails to inform us whether the psychiatrist and Harriet have met in consultation previously or not, if they had it would harm Smith's basis of comparison.

In a third exercise, where Smith wants to create an account of how the psychiatrist's report will be read, she compares 'Harriet's Case' to a textbook account a type of "affective disorder associated with pregnancy and childbirth" (ibid:169). Smith suggests "Let us apply this textbook account, using the pseudo-primary narrative as a substitute for the case record, treating it as that resource from which a collection of particulars is made up" (ibid:169). By pseudo-primary narrative Smith means the psychiatrist's clinical report, not the case file contents. Smith, using the 'Modern Clinical Psychiatry', then extracts a set of instructions or procedures from which to read the psychiatrist's report as to be a description of a case of "recurrent psychiatric disturbance *involving para-natal factors*". She lists these procedures in a schema and then goes on to produce a fourth text which she says "using this schema to select clauses 1,3,6, and 7 from the pseudo-primary narrative and adding some additional materials from the resident's notes, a fully 'psychiatrized' story can be told that unites particulars and schema, very much as the reader interprets the particulars of the case history in terms of the schema" (ibid:170)

Smith, I suggest, is at last focusing on what her phenomena should actually be - the psychiatrists report, but the exercise ends up being a multi-layered construction of Smith's own. Such an account cannot be seen as an account/reading of an actual report, by actual people, in actual activities that constitutes the social relations of which the text is a part. In effect Smith does not research the phenomena that she claims sociology should, actual activities, and so cannot move from them to an ideological documentary method. Hence her research does not support the conclusions Smith wishes to draw from them.

Although Smith is heavily influenced by the ethnomethodological critique of sociological method and adopts many of the methodological criteria that ethnomethodology adopts, one ethnomethodological criteria Smith does not adopt though is the focus on the purely local. Rather she has constructed a method designed to look at the relations between the local and the extra-local. It is this concern with the extra-local that can help explain her methodological confusion, and ultimately, the dropping of women as specific knowers, since

not only does the 'just this-ness' of the phenomena get lost, but also individuals as specific knowers.²⁵ This loss of specific knowers also raises questions about Smith's method as a response to an ideological sociology in which Smith locates ideological practices of abstraction being achieved via the removal of the local from phenomena and the dissolution of the subject.²⁶

Finally, of central interest is the focus by Smith on the role of the written document in local organization. Smith's research, I suggest, has investigated in various ways and with varying degrees of success the possibility of going about this task. The main point that I wish to make here is, that Smith has got the phenomenon right, texts in use, but that she has not got her methods right in researching them.

6.1b A. W. McHoul.

The second body of work which we shall look at in some depth is that of McHoul whose ethnomethodology of texts has focused on reading practices. A good entry-point into McHoul's 'ethnomethodology of reading' is his paper (1982a) dealing with the affinities between hermeneutic and ethnomethodological work as raised by Misgeld's discussion of Gadamer and Habermas, and introduction of an empirical analysis of written texts.

The context of Misgeld's discussion is the construction of versions of

²⁵ Smith's individualist position seems to come from women's positioning historically in relation to male knowledge, rather than knowledge of the individual member. This feminist orientation to the sociology of knowledge may explain some of her 'problems' with locally situated phenomena.

²⁶ In Chapter Three 'The Social Organization of Subjectivity: An Analysis of the Micro Politics of a Meeting', Smith (1990b:58) sticks much closer to her advocated method, possibly due to the fact that it seems to have been carried out after her method was published in its form of 'The Everyday World as Problematic' (1987). Unlike the two studies described above it is a more coherent study and, though space does not allow further discussion of it, an interesting example of her method, although ultimately it fails to attend to both Smith's avowed feminist concerns and her prescribed methodology.

communicative competence in which ideal types exist independent of any occasions of talk, and to which interactants must adhere to in any actual occasion of talk. Habermas is seen as adhering to this position²⁷ whilst Gadamer sees conversations as being 'highly occasioned performances' (though both are seen to rely on some form of 'mechanism' outside of 'human construction') (ibid:92). McHoul's criticism of both of these positions is that they remove any consideration of what interactants do on actual occasions. It is in this sense that McHoul takes issue with Misgeld's consideration of the similarities of hermeneutics and ethnomethodology, the pairing of Habermas with Sacks and Gadamer with Garfinkel. McHoul points out that Sack's notion of rule use is different from Habermas' in that: firstly, Sacks's use of rules is not derived from theory but empirical investigation and, secondly, that Sacks sees rule use as occasional dependent. In relation to the pairing of Gadamer and Garfinkel, though both stress the occasionedness of talk, for Gadamer the participants do not know where the talk is going, whereas for Garfinkel the reflexivity of actions places the control in the participants hands rather than, as for Gadamer, in some form of meta-construct.

McHoul himself aims to adopt a ethnomethodological rather than conversation analytic approach where:

"our project inquiry would have to examine *in situ* occasions of some readings as and in the full details of their livedness; as and in actual, as-far-as-possible-naturally-occurring, practically orientated, ordinary, ongoing activities with specific temporal and spatial locations and specific cohorts." (ibid:102)

He supplements this with "such materials should, where possible, be 'strong' materials. I.e., they should preserve as fully as possible the *in situ* livedness of the occasions that they can only be said to represent" (ibid:103). McHoul attempts an ethnomethodology of reading but undergoes a failure of the

²⁷ For an ethnomethodologically informed critique of Habermas' 'Theory of Communicative Action' see Bogen (1989).

'sociological imagination' when he suggests that such data, 'ethnographies' including audio/visual recordings, is not available for reading activities, and that instead we must rely on reader's reports of their readings.

He suggests that "a reflexive sociology of the analyst's own reading(s) appears to have much to recommend it" (ibid:203), which McHoul claims to have made the first attempt at producing. The result is that McHoul presents us with a self-reflexive report of what he monitored himself doing while reading a newspaper. However, sociologists reporting on what they themselves do while reading a newspaper can be seen as being problematic as a study of naturally occurring reading activity. Thus, like Smith he seems to have problems actually applying his methodology.²⁸

The 'ethnomethodology of reading' is a topic which McHoul had raised previously in 'Ethnomethodology and Literature: Preliminaries to a Sociology of Reading' (1978a), in this he suggests that he was moving away from Garfinkelian ethnomethodology towards the work of Sacks - a thing, as we have seen, he reverses in the above (1982a) study. This paper is programmatic suggesting what a sociology of literature should look like, that it should be a sociology of reading with its topic "the methodical ways in which members go about *making* sense of the written traces of men in society" (McHoul 1978a:114). McHoul takes a very narrow definition of his topic and takes as a starting point "that, as far as authors and readers are concerned, the act of

²⁸ A study along vaguely similar lines is the of Morrison (1981) where an aim is made to analyse written texts in terms of reading practices, it fails in my opinion due to the same reasons Smith and McHoul do. Interestingly though it claims to be directly heavily influenced by Garfinkel's 'studies of work', and yet still fails to avoid these problems. An example of the problems of analysts reading text on behalf of a readership is illustrated by Keller-Cohen (1987) reporting on the redesigning of the Midwest Bell telephone bill. The bill had ran into problems because the design had been developed and read by company employees, but once released into a new cultural environment it proved problematic for readers not engaged in the situated activities typical of Midwest Bell employees.

reading is not a face-to-face interaction" (ibid:115).²⁹ This is the first assumption that McHoul makes, but is quickly followed by a second, that readings are achieved alone and not read out loud. From this, he then assumes that reading is therefore not embedded in turn-taking of an ongoing interaction, and consequently, that an understanding of the text is based upon previous aspects of that text (ibid:116). Further, from these preconceptions McHoul then assumes that the reader's relation to the author is "a 'relation in anonymity' which entails none of the 'checking' devices of communication systems which have a turn-taking mechanism" (ibid:116).

One of the problems of McHoul's approach can be seen to be the fact that he has assumed prior to his investigation what the phenomena he wishes to investigate actually consists of, thus he has restricted himself prematurely as to the phenomena of his potential investigations.

Whilst, this form of 'ethnomethodology of reading' is self-evidently problematic, it is helpful to understand 'why' McHoul ended up taking this path. This can be understood by looking at a second text of McHoul's published in 1978 'Wittgenstein and Criticism: Towards a Praxiological View of the Text' (1978b). This paper is mainly concerned with essentialism in literary criticism, and the similarities of this with the early Wittgenstein of the 'Tractatus'.³⁰ In the critique of essentialism McHoul uses the work of the later Wittgenstein and the work of Garfinkel, largely with reference to the etcetera problem and the impossibility of a complete description. McHoul that notes:

"Instead of *explaining* the meaning of a linguistic term, we should simply

²⁹ Here we see the beginnings in what I have above called McHoul's 'failure of sociological imagination', although maybe this should be 'failure of ethnomethodological imagination'.

³⁰ In a comparison of Wittgenstein and F.R. Leavis McHoul is keen to stress that there is a difference in that for Wittgenstein the propositions of logic must be compared to an empirical reality, whereas for Leavis it is only an imaginable reality that is needed for comparison and truth of a description (McHoul 1978b:52).

do *description* of its use by actual users, who may or may not be ourselves." (ibid:54)

I am not arguing that McHoul's position here is wrong in the adoption of the later Wittgenstein, but that the origin of this in literary criticism has led to a narrow view of texts and reading. McHoul is, in my opinion, correct when he states that an 'ethnomethodology of reading' must bear in mind that, "what the later Wittgenstein, and other contemporary critics of essentialism point to as an object of study is use, actual occasions of use, or the artful, and organised, practices of users of texts" (ibid:55). Unfortunately, he equates users of texts as isolated readers such as researchers.

After this, but prior to 'Hermeneutic and ethnomethodological formulations of conversational and textual talk' (1982a) discussed above, McHoul produced 'The Practical Methodology of Reading in Science and Everyday Life: Reading Althusser Reading Marx' (1980). This is an interesting article which takes as its problem Althusser's view of science, a view which following Bachelard sees the history of science as non-empirical and independent of common-sense thinking and practices. McHoul's aim then is to do an 'ethnomethodology of reading' of Althusser's 'scientific' reading and interpretation of the writings of Marx. McHoul wishes to show how Althusser's reading of Marx relies upon an unexplicated use of common-sense practices. Basically, McHoul believes that he has located Althusser using 'common sense' and 'everyday' reading practices, namely the documentary method, in his reading of Marx. Methods which he accuses Althusser of refusing to take in his account of reading practices.

We have already looked at the problem of McHoul analysing his own readings of texts, here we have him analysing Althusser's theoretical account of how he has read Marx. Although McHoul is not relying on his own reading here, Althusser's account of how he has read Marx cannot be taken, from an ethnomethodological perspective, to be the actual practices he engaged in when reading Marx. As a consequence McHoul actually deconstructs Althusser's accounting practices rather than his reading practices, his is still one step

removed from an 'ethnomethodology of reading', and however interesting the discussion he can not escape this. Again we see McHoul failing at the empirical level.

In his Book 'Telling How Texts Talk: Essays on Reading and Ethnomethodology' (1982b), McHoul reproduces his Ph.D thesis with additional material from the papers discussed above. Here he describes four studies in the 'ethnomethodology of reading', though he immediately notifies the reader of his text that he is not honouring the distinction made in ethnomethodology between empirical materials of investigation on the one hand and 'constructive' or 'stipulative' theorising on the other. Rather, he believes that since practical (empirical) action is the basis of all social action, including all theoretical action "the analysis of (empirical) occasions of reading and work of ethnomethodological discursive practice need not be taken as distinctly separate forms of investigation" (ibid:ix). A position that is very close to that of Smith. However, although theorising may be legitimately seen as a form of practical action, I suggest it does not mean that the practice of theorising is legitimised as an ethnomethodological method, rather it just means that it is a potential topic for ethnomethodological study.

McHoul complains that Garfinkel's ethnomethodology is one that 'eschews' programmatics and prefers empirical investigations of local everyday interactions. This, for McHoul, seems to result in the exclusion of questions of text and textuality: "It is as if ordinariness magically vacated the scene once the question of text entered it. Somehow the participants to the interaction could no longer be considered to be co-present to one another" (McHoul 1982b:3). What I suggest we can see here is that, McHoul has problems finding texts in naturally occurring situated action, and that to get over this he disingenuously claims that reading creates a co-present participant. McHoul contrasts this with his aims which try "to find means of doing investigations of, the ways in which (ordinary) textual objects get locally produced and sustained as (and in) the details of situated occasions of reading" (ibid:3).

Finally, the main problem with McHoul's work, at least for this current

study is, his inability to recognise, or at least navigate, some basic problems with his phenomena in an ethnomethodological fashion, either conversation analytic or ethnomethodological. For instance he notes:

"Reading, in short, is practically a non-observable. To put the problem grossly, third-party observation of some reading's occasion or video-recording the performance of a reading would not preserve the rational methodical practices of those occasions for future analysis in the way conversational recordings and transcripts do." (ibid:103)

Here again we have McHoul displaying a narrow interpretation of the phenomena he is engaged with, an individual reading a text to themselves, the interaction being that of the reader and the 'author'. Of course a recording of such interaction is not going to display any activity, as this interaction is silent and invisible apart from eye-movement and possible non-verbal responses. McHoul, then decides that the way for him to get beyond this problem, after some attempts at breaching experiments, is to give an ethnographic description of his own activities as he reads a newspaper. This, I believe, is McHoul going off in completely the wrong direction as this is different from the ethnomethodologist using their members' methods to understand naturally occurring interaction.³¹

³¹ McHoul quotes Roy Turner in justification of this:

"The sociologist inevitably trades on his members' knowledge in recognizing the activities that participants to an interaction are engaged in; for example, it is by virtue of my status as a competent member that I can recurrently locate in my transcripts instances of the same activity." (Turner 1971:177 quoted by McHoul 1982b:95)

However, Turner is not talking about recognising the activities of the author and how they are recognized by the reader in reading a text, he is talking about recognising activities in a transcript of a tape recorded interaction between two or more individuals engaged in some activity. McHoul is being disingenuous in taking it otherwise.

6.1c E. Livingston.

From the above we can see that there have been attempts to look at the role of texts in interaction, that methodologies have been devised, but that a problem has been locating suitable naturally occurring environments to record data. This has been compounded by a misconception of the nature of what a text is and how it is used. A useful clarification of the nature of texts and their description is provided by Livingston (1995).

The problems that we have raised in the ethnomethodology of reading by McHoul, and to an extent in Smith, can be illuminated by Livingston's 'An Anthropology of Reading' (1995).³² Here Livingston looks at the properties of reading as that reading is explicated in literary criticism. Looking at the accounts in literary criticism of literary texts, and that the accounts of those texts and how these literary texts should be read, Livingston defines these accounts as providing 'instructed readings' of the original literary texts. Whilst Livingston claims that an anthropology of reading examines reading practices themselves, the "phenomena of reading beneath the reasoned discourse" (ibid:5), his phenomena are actually the accounts of literary texts by literary critics. However, Livingston is not unaware of this position and is possibly one of the reasons he has not designated his study ethnomethodological.

Although Livingston does occasionally seem to fall into giving his own account of the literary text as a contrast, sometimes even as the more 'correct' version, his aim is to look at the reading practices that the literary community use. These reading practices he designates as 'reading cultura', in contrast with 'reading simpliciter' as performed by the non-literary (laic) community.³³ It is

³² Although Livingston's studies are usually ethnomethodological in the 'studies of work' sense, he make no claim to this study being ethnomethodological. Whilst this is the case, his anthropological approach is very much informed by his Garfinkelian influences.

³³ The laic and professional reading practices are not separate entities but are inevitably intertwined (Livingston 1995:142).

these reading practices and their basis in a community of readers which is a central focus of the study. Livingston notes that a document does not provide a full gestalt picture of whatever it describes, and may even provide contradictory elements, and that it is the work of the readers to create the picture of events that the documents provide. As to the question of whether the text or the reader 'provides' the interpretation, he states:

"The interrelatedness of contextual clues in a text provides a similar gestalt 'texture' for reading. The interrelatedness of these clues does not lie in the text, but in the activity of reading that uncover them. Neither, however, does that interrelatedness not lie in the text, but in a text already and always embedded in the activity of reading. The clues fit together to provide a description of how the work of reading should be organized, and the clues are uncovered and fit together, in real time, by the reader, as a developing organization of reading's prosaic work." (ibid:14)

What is interesting about this statement, not that I perceive it to be fundamentally flawed, in fact I more agree than disagree with it, it is that none of the materials that Livingston works with as data is in 'real time'. If it was I believe Livingston would possibly have termed the study ethnomethodological, and the fact that he does not I suggest indicates that he is aware of this, although he does not raise it as a methodological issue. The effect of this on Livingston's study is that, when he makes claims as to the nature by which the members of the literary culture reads its texts, he is actually relying on accounts of how those 'should' be read. These are two separate things, as he himself has hinted at (Livingston 1993). Livingston does seem to be aware of this at times (1995:52) but seems to confuse them at others, this is most evident in his ignoring the context of the reading in a social sense as he uses his texts as secondary sources removed from any context of a reader's actual reading activity - either of the primary or secondary texts. Thus I think we can say that more emphasis is put on the role of the text in action than on the actions of the reader, i.e. the emphasis is more on the facilities that the text allows as an object - even if reading is taken to be a uniformly learnt skill, which I doubt. Livingston does not seem to be able to escape from the interpretation of texts

themselves to the description and use of those texts by others, the textual instructions and reported readings not being the same thing.

Livingston designates the text as an object, but an object that is a [text/reading] pair (ibid:19), that communities of readers have methods of interpreting, and non-static ones at that, but the individual and their occasions of reading are largely ignored in his analysis. He states:

"..all characterizations and analyses of a text have this inherent ambiguity as descriptions and instructions. The description of something real is always imprecise; there is always a gap between a description and reading's work." (ibid:55)

Although Livingston's concerns are with descriptions of texts in the prescribed readings of literary critics of literary texts, in the end we are given his reading of those descriptions as their context when we go in search of the reading part of the [text/reading] text. In the way that Livingston has framed his study, as anthropological, this is not necessarily problematic, but the same methods could not be adopted for an ethnomethodological study of situated activities. Livingston's aim is to display how the literary community reads, and how it always locates a rationality in a text (ibid:69), this he partially does.

One of the interesting practices that Livingston points out is the presentation of selected quotes of the literary text and the description of the reading that is to be made if it. This practice allows the possibility of producing an interpretation that, if the literary text was read as a whole, would not be viable. This point is one that is directly applicable to the presentation of data in sociology, where segments of data are presented and translated in a similar 'free' way. But also worthy of investigation as a situated practice in environments such as the courts and tribunals. The importance of the instructed readings is that they "distort" the ordinary laic reading practices, adding or modifying the reading through embedded instructions. The embedded instructions turn the text into a "deeply reasoned object" (ibid:71). This instructed reading can be seen to be evident also in the production of

transcriptions of talk in the human sciences, each transcription procedure having its own rationality and community of readers. This is not to say that such 'instructed readings' are incorrect, as they may provide good and accountable reasons for why a text or transcript should be read in this way. As such they become objects in their own right (ibid:85), and such 'distortions' may be valid within the community concerned. Such distortions of 'original' textual objects are unavoidable in that: "Every reference to a text, to what a text says, to an interpretation, to meaning, to grammatical structure, to rhetorical figures, to prosody, is a reference to an instructed reading of a text" (ibid:94). This in itself does not trivialise the practices and insights of the discipline, for Livingston, in that the literary criticism community derived insights are still valid discoveries of that community (ibid:99). Livingston applies this insight onto sociology and states:

"Even though sociology is directed to real-world studies of the ordinary society, the 'real' society has been mystified; the reality of the real society has become the affair of a community of sociologists, and the authority for an analysis of the society comes to reside within professional practice." (ibid:103)

The reading that a community has of its texts being the valid reading of texts within that community. This being the case we can expect that the reading that legal practitioners make of texts to be displays of the valid readings of texts in the legal community, or at least that area of the legal community, and indigenous to it. Though it must be noted that the notion of community that Livingston adopts is a very unexplicated one, although one assumes it is nebulous without fixed boundaries.

Livingston's study is of the reading practices of the literary community, this community is a very reflexive community in that writing about its own way of reading is part of the task of that community. Whilst, other communities may not be so involved with their own reading practices, the legal community is more concerned than most. However, just as the written instructions in guides to legal practice about legal reading could not, at least ethnomethodologically,

be said to necessarily reflect actual practice the same may be true of the literary community. At the end of the day, we can not say that Livingston has reported on the reading activities of the literary community, but rather upon aspects of their reported reading in the form of 'instructed readings' that are themselves the literary products of that community. Livingston's text is problematic, not anthropologically perhaps, but definitely if incorporated into the ethnomethodological 'community'.

6.1d Further Ethnomethodological Studies.

There are some ethnomethodological studies of the use of documents in action, rather than how they are being read by the researcher themselves. One of these is Heap's (1990) 'Applied Ethnomethodology: Looking at the Local Rationality of Reading Activities'. This study looks at the oral reading of texts by school children in group teaching, the text is also an argument for doing "applied ethnomethodology", which is in essence ethnomethodology without the tenet of 'disinterestedness'. This applied ethnomethodological study aims to assess teaching practices on learning to read, focusing mainly on the situated nature of the identification of errors. That the identification of errors in this teaching practice works theoretically on a one to one basis with the reader, whereas in practice the whole class is in audio-visual co-presence. Heap assesses the possible pedagogical rationality involved in teaching that can only be seen via the use of an ethnomethodological perspective, invisible in traditional educational theory which does not take into account the situated nature of reading in a class full of pupils. This is an interesting paper by Heap, however his concern with an assessment of the pedagogical theories means that we only get sixteen lines of data, the rest of the text becomes somewhat more abstract.

Heath, Luff and Nicholls (1995) looking at computer assisted collaborative work in a news agency where texts are on screen rather than just in a paper format note that the text "does not so much 'mediate' the interaction

between the participants, but is rather 'ongoingly' constituted by and through the interaction" (ibid:213). Heath and Luff (1996) note that despite the paperless office paper documents still play a critical part in work settings, this being due to the failure of the technology to "support intricate and complex social and collaborative organisation which underlies even the more mundane and seemingly 'individual' workplace activities" (ibid:354). This fact underlines the role that documents play in the work activities of contemporary society. Heath and Luff are themselves here concerned specifically with medical records.³⁴ Heath and Luff adopt the position that if the documents are to be used on more than one occasion and by differing medical practitioners, they must embody generic practices of both record production and reading. These practices being especially important in the design of technologies to support collaborative work, rely on viewing the text in much the same way as Livingston (1996). Unlike much of their research work (Heath, Luff and Nicholls 1995, and Heath and Nicholls *forthcoming*) and recommendations (Luff, Jirotko, Heath and Greatbatch 1993), this paper does not rely on video analysis of action in progress, but instead seems to rely on their own reading of medical records - although a reading informed by much research in this area. However, as we have seen in some of the other literature, this method can be problematic. An instance of this here is when Heath and Luff present us with the following record:

14/4/83	c.	'badly bruised' cert 1/4 r/f Brook Centre
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of which they state:

³⁴ Heath and Luff (1996) discuss the computer system know as VAMP designed to assist General Practitioners during consultations with patients. I have looked at video data of the 'Prodigy' system for General Practitioners being developed at the University of Newcastle on which VAMP and similar systems are based, and this data seems to show similar document use as reported by Heath and Luff here.

"The first entry is rather curious, 'badly bruised' in inverted commas is the patient's presenting characterisation rather than an assessment by the practitioner. There is no treatment for bruising and no confirmation of the patient's claim provided. However, whilst the practitioner appears to suggest he could not find evidence of the bruising, the recommended management gives a slightly different flavour. The Brook centre, to which the patient was referred 'r/f', is a hostel for battered women. So while the doctor seems to be ambivalent as to the evidence of the patients 'claim', he was obviously concerned enough to refer the woman in question to the centre. The practitioner has deliberately built in ambiguity and uncertainty into his characterisation of the consultation." (ibid:357)

This analysis rests on the use of inverted commas being read, by medical practitioners as representing a quote from the patient. Heath and Luff on the basis of this take it as being the case that the doctor has not seen the bruising but that it is only reported by the patient. However, whilst this interpretation of the inverted commas seems plausible, it is hard to believe that a patient arrives at a doctor's surgery reporting to be badly bruised from a domestic incident and the doctor does not ask to see the injuries. Instead, the doctor refers the patient directly to a women's refuge! Is it not possible that the inverted commas do not represent quotation marks on behalf of the patient, instead they could denote an understatement on behalf of the doctor - although I would not wish to categorically state that this was in fact the case. In fact, Heath and Luff's conclusion that the record had a built in ambiguity is not threatened by my, or any other, interpretation. But the claim that it will be read by another practitioner as a quote meaning that doctor is suggesting that he did not examine the patient's injuries is not so easy to maintain. What is needed is an occasion on which the records are read by another practitioner, in which the reading is displayed. Heath and Luff are correct in claiming that their paper analyses how documentary records are written, and how the writing is sensitive to the needs of potential readers. That the records are produced for a future use, not necessarily as a record of what has occurred, something that their analysis displays. However, the intention of the doctor writing the records is not easily read from the records themselves, admittedly some references 'seem' transparent in their inscriptions, others nonetheless are less so. Whether the use

of inverted commas suggests that it will be read by another practitioner as the doctor "suggesting he could find no evidence of the bruising" is not too transparent.³⁵

In Hak's (1992) 'Psychiatric Records as Transformations of Other Texts', Hak recognises that an ethnomethodologically informed text analysis does not compare texts against some external 'reality' and judge their validity, but that texts must be studied in the activities that are partly constituted by the texts themselves. Hak's approach is heavily influenced by Garfinkel's '"Good" Organizational Reasons for "Bad" Clinical Records' (1967), and Hak notes that from Garfinkel we can understand that sociologists do not have the necessary knowledge to interpret documents and that they "can only describe the ways competent staff members produce and use records as part of the practicalities of their bureaucratic work" (1992:142). Hak takes issue with this though and suggests that:

"Potentially at least... records can be studied as a product of a psychiatrist's 'practical theorizing' about a patient's given behaviour. Second, a competent reading of - and by implication a competent writing of - psychiatric records cannot completely be defined locally, and the record must bear at least some relation to 'ideal' psychiatric competence, for the simple reason that eventually sanctionable performances by clinical members must be evaluated by outside experts. This means that even a local meaning for present use can be uncovered - at least partially - by using 'ideal' procedures and theories as interpretative tools" (ibid:142)

This initially appears as a harmless assumption by Hak but it is bringing into the description of situated practices forms of explanation that are in essence

³⁵ I realise that Heath and Luff may in fact have other evidence to support their analysis which they have not presented due to the intended audience of this article. My aim here has been merely illustrate the need for caution in assumptions about what the textual document can in fact reveal in and of itself, by using an example from researchers who themselves take this as a serious issue, I hope to have emphasized this point. In this research that caution means focusing on the texts in use, rather than any interpretation of them myself. Although of course I am forced to interpret texts when producing this thesis at a number of levels as well as actually producing one.

theoretical explanations, an aim not dissimilar to D. E. Smith.

Following this and to finally clarify our position here we shall look at a study by Lynch and Bogen (1996).

6.1f Lynch and Bogen.

A significant study relating to this thesis³⁶ is Lynch and Bogen' (1996) 'The Spectacle of History: Text and Memory at the Iran-Contra Hearings'. An ethnomethodological study which focuses on the interplay between spoken personal testimony and written organisational records, rather than attempting to get back to an original event or a decontextualised account of how texts are read.³⁷ There are some similarities between the Congressional Hearings (Lynch and Bogen actually refer to it as a tribunal) and the Legal Aid Tribunals we are concerned with. A similarity increased due to the fact that Oliver North was able to negotiate for his attorney Sullivan to be at his side throughout the hearings, normally the speaker/witness is unaccompanied, North deeming it advantageous to have legal representation, rather than not to.

The data which Lynch and Bogen had available was video tapes of the television coverage, coverage which was extensive in the United States, and thus different from the audio tapes collected for this thesis. Further, their aim was not to cover the whole proceedings, but to *describe* selected moments in an attempt to understand the situated practices by which historical events are composed and decomposed (ibid:1). These situated practices were not just the talk itself, but the role of the written documents in the testimony. Lynch and

³⁶ Goodwin's (1996) 'Professional Vision' which covers many similar issues to Lynch and Bogen (1996) in relation to visual representations, especially the Rodney King trial data.

³⁷ The version of ethnomethodology's position on text I have most closely affiliated being Lynch's (1994:146) statement that: "Wittgenstein and ethnomethodology inform us that the extent to which expressions and texts take on referential functions owe less to the intrinsic properties of representational items than to deeds performed when those items are embedded in action."

Bogen's ability to use visual data allowed them much more scope into the role of documents than is available from purely audio tapes.

Their book covers much of interest that can not be discussed here, though what must be mentioned is their work on documentary interrogation. Lynch and Bogen note the amount of attention in the hearing relating to documents, both those present and those absent (shredded), the discourse itself being never very far removed from the substantial amount of documentation collected for the hearing. Lynch and Bogen note that recognition of when speech was directly from a text, paraphrasing, or non-textual in origin was not signalled as such but was normatively audible, as were comments that we spoken for the official record. Further, they note that it is impossible to state whether the spoken or written word had priority, and often to even make a distinction between them (ibid:205). An aspect which they develop into what could be seen as an 'epistopic' debate between the ideas of Derrida and Searle.

Lynch and Bogen describe what they call the 'documentary method of interrogation' as: "an interrogatory method (or set of methods) in which material documents are used as resources for question a witness" (ibid:214). This is achieved by drawing the witness into the document as an object/exhibit, outlining various aspects of the documents, locating and reading key passages, and relating that to their joint on-going activity in the tribunal. Lynch and Bogen then describe some of the practices that North and Nields (North's interrogator), employed in this document based interrogation and defense, the interrogation relying on hearably document derived questions. Lynch and Bogen suggest that what North displayed in his applied-deconstruction of the document and the questions based upon them, was that the documents did not provide unequivocal 'facts' or 'versions' and that North was able to utilise 'plausible deniability' to out-manoeuvre Nields. Of great interest here was the fact that not only were contents of texts able to be 'denied' in this fashion, but that texts (those that originated from North's alleged activities) had actually

been designed with future 'plausible deniability' in mind.³⁸ The Congressional committee wanted to use documents as representations of real-world events, but the texts did not allow this cutting the present off from the past. This 'failure' of the documents allowed gaps in versions of events to appear which were exploited by the 'hostile witness' North (ibid:224). Lynch and Bogen say of the documentation:

"However definite, the referential details of a document do not act as a foundation for the inquiry so much as they function as one set of resources among many to be used as part of the collective, and contentious, work of building an official history." (ibid:224)

Whilst our legal aid tribunals may not be such historical events as the Iran-Contra hearings, the documents are used to build an official account of sorts, and, like the Iran-Contra tribunal, going over the documents allows the production of another, either contrary or more refined, version of events. This production is constructed however, in the turn by turn interaction of participants. It is worth noting that this study of Lynch and Bogen does call into question some of the ethnomethodological accounts of the nature of textual documents, especially decontextualised versions of reading practices. As this study most closely attends to some of the observations developed in this chapter, it will be from this post-analytic ethnomethodological position that develop our methods and orientation towards the data of this thesis.

6.2 Texts in Tribunals.

We noted in previous chapters the use of textual documentation in tribunals, especially in relation to problem solving and surpassing conflicting

³⁸ Ways of maintaining alternative versions in cross-examinations are also discussed in Metzger and Beach (1996), though this study is conversation-analytic rather than post-analytic ethnomethodology. Metzger and Beach do not focus on the role of texts though.

understandings and impasses that arise during the cases. That from the outset textual documentation is central to the processing of a tribunal case whether attended or non-attended cases. It was suggested that the major difference between them was that in the former the appellant would be present and could be used as a resource, one aspect of which was the ability provide an additional perspective in the interpretation of documents, a factor absent at non-attended cases. We also saw that written documentation helps tribunal members focus on key aspects of the case, as well as being invoked as tools for resolving disputes over meaning that occur in the discussions.

In this section we will look at some of the practices that occur in an attended tribunal case. In the first phase, before the appellant is brought into the hearing, although the panel members may be aware that an appellant will become available for questioning at a later phase, as in the non-attended case (Case One Chapter Four) they only have the documents as a resource. Nevertheless, as we have seen there are a range of activities which the panel members can undertake in this the first phase of the tribunal case hearing (see Appendix Three and Chapter Four). What we shall focus on here though is the issue of what it is that the documents, as illustrated by their usage in the activities of the tribunal members, are seen to be facilitating.

That the tribunal panel orientate to the documents they have been provided with by the Legal Aid Board is evidenced by the Case Two in Chapter Four.

9 ch :now in the normal way we we (.) we look at this in case (.) we
10 have formed a view of reading (.) on this occasion we have got (.)
11 quite a lot of paperwork (2.0)

The panel here can be seen to be orientated towards the documents as evidence, the data, relating to the occurrence of some phenomenon. This phenomenon being not some experiment, but an occurrence in the everyday world or at least a representation of it. The panel members do not have access to the phenomenon itself, but only the documentation relating to its occurrence.

Nevertheless they orientate towards that documentation as being an 'adequate' representation, and they do not, under 'normal' circumstances, doubt whether or not that event has occurred. This is similar to the work that scientists do, in that they discuss the data which represents the original phenomenon rather than the phenomenon itself.³⁹ Explicit reference is made in the above example to the fact that the material they are considering is not the original phenomenon, but rather the textual documentation standing as its representation. The chair also indicates that this is a normal practice of the tribunal, and therefore indicates that they have "normal" procedures. He also seems to indicate that each case presents different circumstances for that procedure, and "on this occasion" there is a lot of paperwork, suggesting that their work will revolve around the contents of these documents.

Further to this we can see that the data is not seen as unambiguous or self-evident. The members of the tribunal have all read the documentation prior to the tribunal, but they do not presume that each of them had made a similar reading or interpretation.

- 6 pm1 :I I was minded to grant it (2.0) (any takers) (0.6)
7 pm2 :my comment about this I made uhh (.) a bit outside my field (.)
8 was about adoption (0.4)

As can be seen from Case Three (see Appendix Three for full transcript) in the initial comment of panel member one (line 6), the chair having just orientated the panel to which case they were to consider next, they give their opinion and ask if any of the other panel members had also made such a reading of the case documentation. There is no assumption here that this was self-evidently the only interpretation that could be made. This is evidenced by

³⁹ This is illustrated by Lynch (1985) who shows that such representations allow phenomenon to be perceived by scientists. Lynch and Edgerton (1988) show how such transformations use the routine aesthetic of scientists, and Lynch (1988) investigates how these representations are used in the construction of 'facts'. Though Lynch (1994) advises caution in the discussion of 'representation' noting that it is a topic for ethnomethodological respecification.

the fact that panel member two (lines 7 and 8), does not give a definite opinion of whether the case does, or does not, in their reading qualify for legal aid, but raises an issue that they wish to discuss further. In doing so they may be seen to be not agreeing whole-heartedly with panel member one, achieved by panel member two by introducing a topic in relation to the documentary evidence that needs some clarification, some further interpretation.

The difference between the panel member in an attended case, even when at the non-attended phase as regards input from an appellant, is that the panel members at an attended tribunal, know they have access to an individual whom they can ask for clarification on opaque aspects of the documents. As in the attended case (Case Two in Chapter Four) of the previous chapter they decide immediately to use this resource. However, in Case Three the panel members spend a short while interpreting the documents with recourse to their own common-sense and legal knowledge. It is only after spending some time discussing the documentation in this manner, and coming to no resolution as to its interpretation that they make recourse to the appellant.

- 42 pm3 :(unclear) worry about what happens (unclear) (.)
- 43 pm2 :that's his worry (.) he expresses it somewhere in the papers (35.0)

The discussion between the panel members as to the interpretation of the documents makes explicit reference to the texts before them. These texts are used as references for grounding their debate, as by panel member two in Case Three (case one line 43 above) - incidentally, this occurs during the transition period while waiting for the appellant.⁴⁰

That the panel members treat the documentation as evidence of a phenomenon, or state of affairs, rather than the 'natural' phenomena, would

⁴⁰ It would be interesting to look in more detail at the design of such references and to the work they do e.g. how they may request that other look/read documents. How they may be used to support particular views; how they may be built to cast the text in a particular light and so on, but this form of analysis is not aimed at here.

seem to be evidenced when they believe that they do not have sufficient data.

5 pm1 :we ought to have expert evidence (unclear) (1.0) reluctant to see
6 him embark upon (3.0) application until know what we've got
7 (unclear) (4.0)

32 pm2 : [but surely (unclear) on this to get psychiatric report and
33 opinion (.)

This desire for further information occurs twice in the Case Four. In the first instance (lines 5 to 7 above), panel member one does not make explicit what the further evidence they believe desirable is, this may reflect that it occurs at the beginning of the panel's discussion. But later on in the discussion (lines 32 and 33), a desire for further information is requested and its nature is made explicit. Another instance of the request for further information is made, this time relating to the age of the children, but on this occasion the clerk is able to provide the information (lines 47 to 48). At least partially since the clerk does not have the age of all the children.

47 ch :how old are these boys do we know it isn't in the papers that
48 we've had (.)
49 cl :we (.) we (.)
50 ch :they presume we do know do they
51 cl :yes (.)
52 ch :how old are they (0.2)
53 cl :the son (name) is (age) (0.2) (name) is (age) there is there is
54 another child (.)

This provision of information by the clerk is notable in that it indicates that the panel members do not have all the possible evidence, but that they have been selectively provided it by the legal Aid Board - at least on this occasion. The clerk has a fuller set of documentation, though as evidenced here, not 'complete', which is available to the panel if it becomes necessary.

Many of the activities that the tribunal members get involved in while assessing a case seem to put into question what the phenomenon is that they are

actually dealing with. We assume that the phenomenon is some event that occurred and which is subject to legal action, of which the case documents stand as a representation. At a basic level it seems that the tribunal panel orientate to the documents they have been provided with by the Legal Aid Board as representations of some phenomenon to be explained, and that this phenomenon is an original occurrence. While this again indicates that the panel are not looking at phenomena in the original, but rather they are working from documentary representations, and this appears largely unproblematic for them. The reason why this may be unproblematic we saw evidenced by Case Two where a view is formed not just of a phenomenon as an isolated actual event represented by documentation, but of a case in law in documentation. The panel members are looking at the documents as representing a legal case not just an originating phenomenon. Further the documentary representation of events is not expected to be a 'natural' representation, but a representation orientated to legal practices, procedure and statutes. This representation is constituted by a number of documents which have a procedural way of being assessed, but that procedure does not necessarily remain identical on each occasion. From this we can see that the phenomenon that the documentary representations constitute is not unambiguous, as it appears to be both a past phenomenon and a current one. The current phenomenon that the documents are a representation of, a legal case, is also a phenomenon in its own right, not just in the sense that any representation is itself an object phenomenon, but that here that object phenomenon is being assessed itself, not just what it represents. This phenomenon is a collection of documents representing, and constituting, a legal case orientated towards legal processing in the courts, but, and this will be illustrated below, a case orientated towards the gaining of legal aid (and which has already been refused once) that has to be presented as representing a case going to court in order. That is if it is to satisfy the criteria of the legal aid board for the granting of legal aid. These criteria become manifested in the form of the legal aid tribunal member's deliberations.

To summarise, the documentation which is presented to the legal aid

board would seem to be a representation of three individual, but connected phenomena:

- a. A past event that it is claimed is in need of legal adjudication.
- b. A current event, a case constituting an appeal against the refusal of legal aid.
- c. A future event, a case that will potentially end up being adjudicated in a court of law.

Considering that the case documents are representing all of these, although it must be remembered that they are doing all these in the temporal present of a legal aid tribunal, we can see that role that the documents have to perform is a complicated one.

This complicated function of the documentary representations makes it obvious why attended tribunals are preferred by the tribunal panel, in contrast to the unattended, for ease of understanding and interpretation of the phenomena. Of course, the extent to which each appellant can help in the interpretation of the documentation by the tribunal is not the same in each instance. The more skilled the appellant at understanding the needs and functions of the documentary representations the more likely, it can be assumed, they will be in assisting the tribunal. This will be seen below in the second where the appellant will have the assistance of a legal representative as well as being present themselves.

6.2b The Legal Representative and the Focus on Textual Representation.

It was suggested that these representations could all exist in the temporal present of a legal aid tribunal, although the focus of the panel may be on one or other of them. The complicated functioning of the documentary representations makes it obvious why attended tribunals are preferred by the tribunal panel, in contrast to the unattended, i.e. for potential ease of understanding the interpretations of the textual phenomena. The extent to which each appellant can help in the interpretation of the documentation can not be expected to be the same on each occasion. The more skilled the appellant is in

understanding the needs and functions of the documentary representations the more helpful they are likely to be in assisting the tribunal, though this can not be assumed to always be the case. A focus in this thesis being the actual practices of legal practitioners and activities around the manipulation of the texts which form the data which it is the panel's task to interpret.

In descriptions of the work of the legal representative as in Case Five, it appears that documents are used as support for a preferred 'goal' i.e. the granting of legal aid. This work entails persuading the panel of the credibility of the interpretation that the representative wants them to read into the documents. The manner in which this is done does not seem to be reliant on an understanding and interpretation of the legal statutes pertaining to the case, as much as the interactional skills and technique of negotiation and argumentation.⁴¹ This is clearly displayed in this case where the representative's activities are seen alongside the activities of their client. The client here, unlike most other legal institutions, not being restricted by rules of formal procedure from joining in the interaction. What is noticeable is the contingent nature of the work of the lawyer, that he does appear to follow a set rules of procedure which would related to the positivist view of legal procedure, but has as more ad hoc approach. This also seems to be true of the work of the panel, as although the chair does try and 'control' the discussion with recourse to legal statutes, these are themselves employed on an ad hoc basis.

We have described (in Appendix Three) many of the activities that the legal representative engaged in on behalf of the appellant, and how these revolve around the textual documentation that is before the tribunal panel. These activities have been seen as they occurred in the data, and they are unique in this fashion to this particular case. Without detracting from this description, I suggest that we can also see the work of the representative as

⁴¹ The importance of relatively subtle variations in language and presentational style in courtroom interaction are reported to influence juror's reactions and deliberations (Conley, O'Barr and Lind 1978). There is no reason to suspect that the same is not true to some extent with tribunal panel members.

negotiating a course through the tribunal, in which his aim has been to have his version of events that the documents provide for, as the one to be considered. In the description we can see the representative trying to control the direction of the case hearing. However, I suggest that this version of events can be supplemented by viewing these attempts at control in terms of negotiation of the three versions. Though it is not being suggested that the concerns of panel, appellant, and legal representative are positioned in the same way in all tribunals. Neither is it being implied that this is the only 'tactic' that the representative employs, or that it is employed from the beginning. What I am suggesting is that it has been employed here and that it is possible to see much of the interaction, not as disputing versions of events, but as deciding which representation is the salient one for the tribunal to consider.

We can track, if briefly, some of the movement from the representations provided in the documents. Of course these have to be situationally invoked, and other representations could undoubtedly be invoked in other situations, however, we are concerned with the legal aid tribunal described above.

111 ch :so are you saying that no transition plan was drawn up (.)
 112 s :well as far as I can ascertain no transition plan has been drawn up
 113 and I have discussed this with mister and misses (name) (.) and ch
 114 : [they would surely
 115 know
 116 s :-and the latest official document was the (.) latest form of the
 117 statement (.) which (.) was dated the 14th of august ninety-two (.)
 118 and I have a copy of that and that actually recommended that the
 119 child remain (.) at the school where he then was which was the (.)
 120 (name) special school in (place name) (.) and that always remained
 121 (.) err the wish (.) of the parents (.) now its part of our case (.)

We can see early on in the second phase of the tribunal (Case Five), we have the chair and the solicitor discussing the documents with reference to events in the past which they represent. This pertains more closely to what I suggested were the main concerns of the parents and we can see their legal representative as stressing those concerns, and current wishes of the parents in relation to those events (lines 118 to 121).

134 s :that's right (.) but the main thrust of my argument is really based
 135 upon (.) that judgement that was made in december (.) erm and
 136 (0.2) the fact of the matter here (.) is that (name of child) was
 137 destatemented (.) there was never a considered reason why the
 138 statementing process (.) should stop when he reached the age of
 139 sixteen (.) the local education authority simply did that (.) they
 140 shouldn't have done that (.)

A short while later we have the legal representative give a version of what he believes the documentary evidence submitted as a case represents, or what he wishes the panel to see it as representing. At this point it is still anchored to the concerns of the parents and the situation of the child, but we can see it as focusing on the activities of the local education authority and the legitimacy of those actions.

217 ch : [yeah [so what (.) surely your
 218 best point is this (.) that the the local the education authority have
 219 not got to grips with need (.) to (.) take and make a proper
 220 proposal (.) for this for (child's name) (0.2) am I right (0.2)
 221 s :well what I'm saying is that they are no longer maintaining a
 222 statement (.) und that they are (.) unlawfully failing to maintain a
 223 statement (0.2) that they've adopted a policy (.) that where
 224 children have special educational needs and are statemented (.)
 225 they will automatically cease to statement them at sixteen (.)
 226 without considering whether it's appropriate (.) those are the facts
 227 of the case (.)
 228 ch :well you don't do you have any evidence of the policy (.) I mean

Yet a little further along we can see the chair trying to focus the concern of the legal representative, and his description of what the representation provided by the documents that the panel should be concerned with, as focusing on the child and the local education authority's actions towards that child (lines 217 to 220). However, the legal representative maintains his stress on the documentation as representing a policy, an 'illegal' one, and in doing so the focus is not on the action in the past towards the child he is representing, but a policy which needs to be revoked by action in the courts (lines 221-227). We can see that he is not being totally unsuccessful in making the chair attending

to the case documents in this light, although it is only to the extent that the chair believes that documents do not support that representation (line 228).

288 s :it's it's the ceasing to provide statement (.) that we're tackling
289 here (.) and what we are saying is that there's a policy (.) that
290 in all cases of children with special educational needs (.) they will
291 cease to cease to statement them (.) those individuals without
292 considering whether that is appropriate or
293 pm : [what is your evidence
294 what is your evidence for that (.)

We can see another instance of this attempt by the representative to have the documents viewed in this light, note that by using "we" he is invoking it also as the position of the parents whom he is representing (line 289). However, on this occasion it is a panel member who does not see the documents as adequately representing such a stance (lines 293 to 294).

337 ch :can I ask mister and misses (child's parents name) I mean (.) what
338 has happened so far as (.) (child's name)'s education is concerned
339 at the moment (.)
340 m :he's at (name) college errm (unclear) but (.) he's there (.) he was
341 very borderline as to whether or not they could take him or not (.)
342 and he's he does have (.) very difficult problems (unclear) with
343 behaviour so if therefore they decided to (.) errm (.) to (dis...?)
344 (child's name) from college (.) which they are perfectly entitled to
345 they don't have to keep him there (.)

A short while after this we see the chair focusing back on the issue of the child, and doing this not with reference to their representative, but the parents themselves (lines 337 to 340). Here we see the focus move back to the version of what the parents think the documents represent, a past event that has had undesirable consequences for the child, and the mother illuminates the repercussions of this past event (line 340). This was a shift by the chair in focus, and can be seen as a response to the continued focus on the interpretation of documents given by their representative.

365 pm? :so there's no problem at the moment but your concern is what
 366 would (.) what might (.)
 367 m :I'm not happy with him at the college I didn't want him to go to
 368 the college and I pleaded with them to stop at school but I didn't
 369 (unclear) (.) I mean (.) my son was ran out into the road the other
 370 day (.) he could have been run over and killed and I wouldn't have
 371 a son (.) that's never happened while he was at school (.) I don't
 372 know but they really are (.) qualified enough to be looking after
 373 him (.) und

We can see that the one of the panel members interprets the version of the representation of the documents provided by the mother, as not being problematic at present (lines 365 to 366). The mother contests this version with a statement of her unhappiness with the result of the past event in dispute (lines 367 and 368), and gives an example to illustrate it and then queries the suitability of the present situation in light of this example (lines 369 to 373). Note that no reference is given to the policy version of concern to their legal representative, the reference is to the current situation caused by a past event which the parents want rectified.

428 s :I'm saying that but that's a broadly based proposition that could-
 429 c : [no no
 430 s :-apply to other children as well (.)
 431 c :oh I mean hah
 432 s : [my my case is
 433 c : [mister (solicitor's name) we got to you
 434 mustn't (0.4) may I remind you you're seeking legal aid for
 435 (child's name) (.) now it really is (child's name)'s needs and
 436 (child's name)'s concern we're dealing with today and not (.) the
 437 general picture of education in (county name) (.) I mean it's (.)
 438 they have not (.) I mean (0.4) mister and misses (name) you have
 439 told us they have not provided you with full-time education (0.2)

Nevertheless, when their legal representative returns to the discussion, he returns to his version of the representation provided by the case documents as being the one about the policy of the local education authority. Although he attempts to attach this to the concerns of his clients by stating their concerns affect other children as well (lines 428 and 430). At this point we see the chair

focus on the issue that they see the case documents as pertaining to a representation of an appeal against the refusal of legal aid (line 434), and not with the issue of the legality of a supposed education policy (lines 436 and 437). The chair then returns to the parents and their version (lines 438 and 439).

450 s :well (.) only one point which is that this is a public law matter in
451 the sense that we are dealing with statutory obligations and
452 although (.) (child's name) was an interested party (.) there is (.)
453 the point that if we are challenging what we say is there policy that
454 does have a knock on effect for other children (.) but of course if
455 we are seeking judicial review we're saying (.) that they are failing
456 in their specific duties towards (child's name) because he's-
457 c : [mmmh

The legal representative does not however, give up on his view of what the focus that case documents represent should be, and we can see in his summing-up that he is still keeping this as his earlier emphasis (line 450 to 452). However, he is not ignoring the expressed concerns of the chair and their view of what case documents represent, and words his interpretation as to encompass the concerns of the representation of the documentation as to the child named in the appeal (lines 454 to 456). This orientation gaining a recognition token from the chair (line 457). So we can see that events that the documents are seen to represent by the various parties are not mutually exclusive in any sort of isolated fashion.

471 s :errm is there anything else that we've (0.8) it's a matter of
472 judgement on this point but (.) our (.) original application was
473 ruled out on the basis (0.2) that we didn't have a case (0.2) I (.)
474 think that one (.) has got to take (.) a view of the way that
475 proceedings can be dealt with in this sort of tribunal which is an
476 appeal tribunal (.) this isn't a review of a judicial review
477 application (0.2) and I have not prepared it on the basis that we're
478 going before the court on a (.) a full hearing (.) this is a hearing
479 to establish whether we should have legal aid (.) there may be (.)
480 deficiencies in my arguments today through lack of preparation
481 because (.) of the nature of today's proceedings is with regard to
482 whether we should get legal aid (.) I would say that on the basis
483 of what we have put before the tribunal today (.) I think that

484 we've established that we've got something substantial to argue
485 about (.) and I think at the very least (.) it merits a decision (.) to
486 obtain counsel's opinion (.) at the very least (0.2)

At the end of the legal representatives summing-up, we can see that he makes a direct interpretation of the documents and what they represent, in terms of the appeal against the refusal of legal aid (lines 471 to 474). He does this to the extent of saying that the present appeal tribunal has to assess the documents and what they represent, with reference to the appeal against the refusal of legal aid (the view of the documents that the panel are concerned with). Rather than the interpretation of what the case documents represent that he himself has been arguing for throughout this phase of the tribunal, that they represent a case to be answered in a court of law by the local education authority (lines 474 to 479). He even goes as far as to say that for this reason any flaws in his argument that the documents represent a valid case in a future court case should be over-looked (line 479 to 482). He then goes on to make suggestions about the nature of the award of legal aid which he believes the case merits. It is notable that he does not make reference to the representation of events that the parents can be seen to view the case documents as representing, but remains with that of the panel. This is interesting in that the legal representative does not represent the interpretation that his clients hold of the case documents, but concentrates more on his own agenda and eventually that of the panel.

In Case Five⁴² the panel themselves seem to orientate favourably to the information that the mother of the child furnishes them with, that she is worried about future consequences that are not provided for at present. Nevertheless, the information which she provides for them is continually trying to be controlled by her lawyer, who is attempting to direct the panel's concerns rather than let them have control of the direction. This case is especially interesting

⁴² The appellants here are accompanied by a legal representative, hence both appellant and representative are available to the panel for further clarification of the case and its documentation. This is not an uncommon occurrence, though by no means does it occur in the majority of cases.

because, it illustrates the three representations that the documents were seen to provide for above. We can see, I suggest, that the main concern of the mother and her view of what the texts represent is that of a past event, the failure to statement her child, that is in need of legal adjudication as to its legality. Although her concern is with obtaining a statement rather than the finer points of education law. The tribunal panel are concerned with the current event, whether the documents represent a case constituting a successful appeal against the refusal of legal aid. And the lawyer seems to be concerned with a future event that the documents represent, a case of sufficient evidence that will end up being adjudicated in a court of law and showing that the Local Education Authority in question has an unlawful education policy.

Of course, each of these three parties does not remain only with one version of what the representation provided by the documents constitute. The mother joins in the discussion of the tribunal in its discussion of the documents as constituting a valid appeal. The tribunal panel show a genuine concern for the situation of the child which the documents represent, as well as an interest in the larger ramifications of an education policy that is illegal (although not as much as the legal representative). And the legal representative, while displaying a primary concern with obtaining a judicial review of education policy, does display attention to the requirements of the tribunal panel in their view of the case documents as an appeal - and to an extent, the concerns of the mother and situation of the child.

It is my suggestion, that we can see some of the difficulties over the interpretation of the documents as being due to the three representations that the documents are used to provide for.

This case has illustrated the important role that the legal representative can play in the tribunal process. It has shown that this revolves around discussion of what the documentation is representing. The documents have more than one possible interpretation, and much of the discussion revolves around negotiation of what will be the salient one for consideration of the case. However, it should not be assumed that the other interpretations have no

influence on the final interpretation presented by the representative to the panel. Instead this final interpretation can be seen to be incorporating the concerns of all parties, but especially those of the panel. In doing this the representative presents a self-reflexive account, that is aware of the situated activities that preceded the delivery. This is a sophisticated activity in which the reading of the texts is situationally oriented, and is displayed as such by the member concerned. The texts, interpretations, and application of law does not follow a positivist model, but is self-reflexively negotiated with reference to the ongoing situated activity.

6.3 Chapter Discussion.

Looking at ethnomethodologically inspired research on texts in this area, we noted Garfinkel's observation that sociologists can only describe the ways competent members produce and use records as part of their work (Hak 1992:142), and that this has been a difficult practice to adhere to for most researchers. It was suggested that Smith, although heavily influenced by the ethnomethodological critique of sociological method and adopting many of the methodological criteria that ethnomethodology adopts, although appearing to get her phenomena right ultimately fails to deploy a coherent set of methods right in researching them. Our critique of McHoul was that he assumed prior to his investigation what the phenomena he wished to investigate actually consisted of, and that his 'ethnomethodology of reading', though aware of the issues, largely fails to follow these them himself in his own empirical studies. Specifically McHoul has problems finding texts in naturally occurring situated action, and that to get over this he disingenuously claims that reading creates a co-present participant.

Livingston's concerns are with descriptions of texts in the prescribed readings by literary critics of literary texts, and this anthropological approach does not claim to be an ethnomethodological study of situated activities. However, Livingston's aim is to display how the literary community reads, and

how it always locates a rationality in a text, yet instead of reporting the reading activities of the literary community he deals with of their reported readings in the form of 'instructed readings'. Livingston's text is problematic, not anthropologically perhaps, but definitely if incorporated into the ethnomethodological 'community'. What we have attempted to show in this review is that investigation of situated activity in legal aid tribunals with a focus on the role of textual documentation, is by no means a straightforward task. These are complex activities and require sophisticated research strategies, and that we have seen the difficulties previous researchers have had in adhering to their strategies.

That the issue of ethnomethodology and textual analysis remains problematic for researchers is evidenced by Watson (1997) whose discussion of the area fails to provide an example of text use in interaction. Incredible when we recognise that ethnomethodological studies are centrally concerned with taking the interactional setting and intermediate local relevances of particular actions into account. We have suggested that the research that comes closest to addressing our research interests and methodological concerns is that deployed by Lynch and Bogen (1996), a study which Watson (1997) surprisingly neglects. Lynch and Bogen's study of the judicial proceedings of the Iran-Contra Hearing, while not identical in its concerns of our study, seems the most suitable from which to proceed further. However, the post-analytic ethnomethodology that Lynch and Bogen advocate, is both relatively recent, and I suggest, methodologically sophisticated. Ethnomethodology itself is, I believe still a young and developing programme of studies, the post-analytic positioning by a quite small number of researchers is both radical and challenging.

This in a sense do not attend to implicit critique that has been made in this chapter, that the research on document use seems to consistently fall wide of the mark. The 'fact' that documents are 'loose' descriptions, but they become adequate and sufficient when their user has the members knowledge for their practical use but that that use is not necessarily static across the

members who might use those documents was noted by Garfinkel (1967) and others in the early ethnomethodological studies. In this current study we have seen the tribunal panel members *ad hoc* there decisions in a similar fashion to Garfinkel's jurors, however in this chapter we have focused on the documentation as constituting 'representation', in investigated what is the textual phenomenon or phenomena end up being constituted as be the various actors at a Legal Aid Tribunal panel. It was shown that the documents provide for more than one representation or phenomenon and that many of the activities of decision-making revolve around dealing with these multiple representations., a fact that has potential consequences for the resolution of ambiguities in interpretation. It was seen that in the case we looked at in this chapter that the documentation which is presented to the Legal Aid tribunal constituted at least three individual, but connected phenomena:

- a. A past event that it is claimed is in need of legal adjudication.
- b. A current event, a case constituting an appeal against the refusal of legal aid.
- c. A future event, a case that will potentially end up being adjudicated in a court of law.

These multiple representations that make be invokable through documents and their usage, I suggest only become fully evident in the temporal present of their actual usage by members in their on-going activities. Research which ignores this, which I have suggested much previous work on texts has done, giving texts singular representational meaning, often decided upon outside of any situated usage by members, read-off by an analyst outside the context of their usage, may be ignoring the complexities of practices and consequences of situated documentary usage. Rather, like Garfinkel (1967) we have seen that documents cannot be seen as standing on behalf of something which is independent of their organizational uses, and that usage is not singular and neither are contents of the documents. The usage that documents will be put, and the representations that they will be found to contain are not necessarily decidable in advance, but only once use of them is being made.

Finally, I suggest that we recall Garfinkel's point, and it is beautifully

simple, that a social science that describes the actions of members in terms of a scientific rationality, a rationality that is not used in the 'everyday life-world' of members, is trying to use two incompatible systems, and consequently ironising common sense rationality (1967a:276). Hence, the troubles social science has in describing social action and rationality are "due not to the complexities of the subject matter, but to the insistence in conceiving actions in accordance with scientific conceits instead of looking to the actual rationalities that person's behaviours in fact exhibit in the course of their managing practical affairs" (ibid:277). As a conclusion to 'Studies in Ethnomethodology' Garfinkel states: "In a word, the rational properties of conduct may be removed by sociologists from the domain of philosophical commentary and given over to empirical research" (ibid:282).

Chapter Seven - Concluding Comments.

"I've been trying to fit everything in, trying to get to the end before its too late, but I see now how badly I've deceived myself, words do not allow such things. The closer you come to the end, the more there is to say. The end is only imaginary, a destination you invent to keep yourself going, but a point comes when you realize you will never get there. You might have to stop, but that is only because you have run out of time. You stop but that does not mean that you have come to the end."

Paul Auster 1987 - 'In the Country of Last Things'
London Faber and Faber

The aims of this research were stated at the beginning of this thesis, and it is to these that we shall attend in concluding. The reader will have realised that although phenomena of this study were descriptions of legal activity, there has been little attempt to tie this thesis into the bodies of work that go under the terms of Socio-Legal studies or the Sociology of Law. Instead, if this thesis has to be described and placed with and body of work I would myself see it as a 'study' within a broadly ethnomethodological tradition. Personally, I see this thesis as a 'study' with debts to work within the ethnomethodological tradition, but also to areas outside it. The basic idea that one should look at the actual practices of those you want to investigate has been expounded by others than ethnomethodologists alone, and its simplicity is displayed by Geertz (1973:5) in the following:

"If you want to understand what a science is, you should look in the first instance not at its theories or its findings, and certainly not what its apologists say about it; you should look at what the practitioners of it do."

And in a sense, this is a conclusion which I believe this thesis not only comes to, but also forcefully displays. This conclusion is not new, but it seems to be one that has to be constantly repeated, and although there are fine exceptions it is one which as Travers (1993) has noted those within socio-legal studies and the sociology of law seem particularly deaf to. By having paid particular

attention to the epistemological issues not only of my own methodology but to those of positivism too, I hope I have displayed the importance that such issues need to be accorded in research. However, this thesis was not intended to be a solely programmatic argument for the study of legal phenomena and I will not attempt to reinvent it as such now.

This thesis has attempt to achieve four objectives: a) to provide a description of the activities that can occur in Legal Aid Tribunals, b) to explore the use of documentation in the tribunal practices of tribunal panel members, legal aid clerks, appellants and their representatives; c) to do so through the adoption and adaption of a post-analytic ethnomethodology, and d) to apply this to an epistopic discussion of legal positivism. We will now briefly look at these and also comment of the social policy implications of this thesis.

7.1 On the Description of Legal Aid Tribunals.

While no suggestion has been made for, or even the possibility suggested, that the description of a number of unique cases can cover all possible occurrences, I believe we have a good idea of what has occurred, and in detail, oo a few occasions. The aim has not been to develop a general model to cover all occasions but to look at the complex local activities which constitute individual occasions of legal aid tribunal. However, while any generalizability is on the whole disavowed, it would be disingenuous to suggest that such practices to not occur on other occasions. Although these would be contextually situated and organised.

With the above in mind we have seen cases which have been either attended or unattended, either with legal representation or without, have been granted or have been rejected, have been unanimously decided or not, that have either followed a 'normal' four phase procedure or have not.

An aim of this thesis was to present to the reader a series of descriptions of individual cases which adequately and accurately represent aspects of legal aid tribunals. Although no abstraction of the individual and unique occurrences

of the phenomenon described was attempted it was evident that on occasions the tribunal members were orientating themselves, and orientating appellants to a series of procedural phases. These were summarised as the following four phases as: Discussing the Case and Deciding on what to ask the Appellant: the panel discussed their prior readings of the case documents, to a greater or lesser extent, and decided what issues to address to the appellant and/or their representative. Discussing the Case with the Appellant: the appellant was given a formal history of the case so far by the clerk, and introduced to the panel by the chair. Then a discussion of the case ensued, initially based upon the issues identified by the panel in 'phase one'. Considering the Case and Coming to a Decision: in the absence of the appellant they came to a decision on the merits of the case, based upon their initial perceptions of the case and the additional information presented by the appellant. They also decided on the nature of their decision, i.e. what an award would consist of, and possibly how this information was to be transmitted to the appellant and/or their representative. Delivering the Decision of the Panel to the Appellant: the appellant returned and was given the decision by the panel. The appellant was either congratulated on the outcome of the tribunal prior to leaving.

Whilst admittedly these 'phases' cannot be claimed to not appear here as analytic categories imposed on the data in any fashion, they are also clearly attended to by the participants and evidence was shown for this. This was seen as a potentiality only for the attended tribunals as the non-attended tribunals, due to the absence of the appellant or their representative, did not allow for such a possibility. These attended and non-attended dimension of the tribunals, later described in terms of dialogical and monological assessments, were seen as being of potential consequence for the evaluation of a case and on occasion overtly referred to by the tribunal panel themselves.

However, we also saw instances in which the tribunal did not necessarily always move through the 'four phases' in instances of attended legal aid appeals tribunals in this thesis. That a foreshortening of the 'typical' procedure was possible, and this was seen to display the not inconsiderable

flexibility over process the panel members have. This flexibility appeared to revolve around the specific requirements of individual cases and the approach that the panel adopts towards their assessment which developed during the interactions of the panel members, clerk and appellant/representative. As the work necessary to assess a particular case is not fixed in advance, but is instead a result of the developing interaction of those involved, it is evident that the focus should not be on the phases but instead the 'constituting' activities themselves - what it is that the activities that the four phases are perceived by the members as 'meant' to achieve, for all practical purposes.

7.2 Document Usage in Lega Aid Tribunals.

It has been shown that a key aspect of the activities of the members of the tribunal panel, clerk and appellants is the use of documentation. Documentation was seen to be an almost all pervasive aspect in the activities of the tribunal from initiating the case to its final closure, and as we have seen on innumerable instances in-between it was constituted as a focal point for a myriad of different activities. Notable was that the documentation was not taken as being all of an equivalence, some documents being constituted as of greater centrality and status to others, although this was locally negotiated by the members themselves. Also, the panel members looked at the documents as representing a legal case not just an originating phenomenon. Further, the documentary representation of events was not expected to be a 'natural' representation, but a representation orientated to legal practices, procedure and statutes. This representation is constituted by a number of documents which have a procedural way of being assessed, but that procedure does not necessarily remain identical on each occasion. From we this saw that the phenomenon that the documentary representations constitute is not unambiguous, it appears entail a past phenomenon, a current one and a potential future one. The current phenomenon that the documents are a representation of, is also a phenomenon in its own right, not just in the sense that any

representation is itself an object phenomenon, but that here that object phenomenon is being assessed itself, not just what it represents. In light of this it was suggested that the documentation which was presented to the legal aid board could in the case we considered be seen to be a representation of three individual, but connected phenomena:

- a. A past event that it is claimed is in need of legal adjudication.
- b. A current event, a case constituting an appeal against the refusal of legal aid.
- c. A future event, a case that will potentially end up being adjudicated in a court of law.

Considering that the case documents are representing all of these, although it must be remembered that they are doing all these in the temporal present of a legal aid tribunal, we can see that role that the documents have to perform is a complicated one.

That the significance of the written documentation is situationally organised and informed confirms some of the concerns that were raised about the research into documentation in previous studies. We seem confirmed in our suggestion that while Dorothy Smith's concern with the role of the written document in local organization was correct, her concern to orientate this to trans-situational issues impeded the adoption of a suitable research methodology especially its design. We can also see our critique of McHoul confirmed as his attempt to understand texts through and ethnomethodology of reading where he is the reader, thus prevents any understanding of the use of texts in 'natural' situated activity. As we have seen, the reading of texts in situated activity can be partial and orientated to activity not contained within the texts themselves, aspects that McHoul's methods do not have the opportunity of describing. This same critique applies to Livingston to the extent that he provides a report on reading activities of the literary community, instead of their reported reading in the form of 'instructed readings'.

7.3 Post-Analytic Ethnomethodology.

The research perspective adopted and adapted here was of course that of the ethnomethodology of Garfinkel in general, and in the work of Lynch and Bogen specifically. This post-analytic ethnomethodological perspective is not an easy option and while we did attempt some clarity, I believe in the end that to do justice a separate thesis would be needed. Nevertheless, once it is clarified that 'post' analysis is not 'anti' analysis it possible to use this methodology in what I hope, and believe has been a fruitful manner. A key aspect of this work revolved around the studies of science which, rather than separating specialised activities from ordinary activity, it displays as constituted by such activities, especially at the work site.

Post-analytic ethnomethodology and its practice of 'description', I have suggested, is not the rejection of all methods or techniques of analysis, but the claims of analysis to some epistemological justification which was then seen to legitimise the adopted methods. The post-analytic ethnomethodological position, as I understand it, is not that all methods or analysis are intrinsically problematic, but rather that their validity *is* when claimed with reference to some external point outside of the situated activity which they are investigating. This is not to say that some sociological forms of analysis, if not most, are inappropriate to ethnomethodology and cannot be used for the study of ethnomethods. I, and neither do Lynch and Bogen as I understand it, claim that this position has been fully worked-out, and it is not as simple as a single paragraph would portray it to be, but its adoption here has been part of the exploratory nature of this thesis. As such I believe it is worth giving a fuller description of what I understand the post-analytic project to mean and the practical applications of this.

7.3a An Understanding of Post-Analytic Ethnomethodology.

An aim of this thesis is to try and clarify on what Lynch (1993), and Lynch and Bogen (1996), mean by post-analytic ethnomethodology. I believe that as a methodological programme it has an almost 'in-built' opaqueness due

to its anti-foundationalist stance and that what it is will be unique to each study. This makes any description of it problematic, compounded by the rarity of post-analytic studies to use as relevant examples, so it may better to first say what post-analytic description is not: 'post' analysis is not 'anti' analysis. As Lynch notes:

"Post- differs from anti- by suggesting a temporal (dis)placement 'after', rather than an opposition to, the term that follows the prefix. Direct opposition and inversion are replaced by a 'free play'. A post-modern-architecture plays itself off in various ways against modernist styles while retaining an ironic affiliation to an earlier genre." (1993:312)

Post-modernism is thoroughly related to modernism for Lynch, its difference being the rejection of the epistemological justification of modernist projects, instead its 'validity' is perceived as being largely dependent on the situation of its invocation. In terms of analysis, Lynch is not "repudiating analysis but suggesting a retrospective relation to already accomplished analyses" (ibid). Consequently post-analytic ethnomethodology does not deny the value of proto-ethnomethodological studies, but believes that they must be viewed in the light of post-analytic developments.¹ Developments which are reflected in his suggestion to 'forget science', to "forget trying to act - or trying to convince others that you are acting - in accordance with some general epistemological

¹ Lynch's critique of conversation analysis focuses on the claim to an epistemological justification based upon that of the natural sciences. This is why Lynch so much laments the development of conversation analysis away from the 'primitive natural science' of the early Sacks. Significant though is that Lynch does not deny the usefulness of the insights of conversation analytic studies, but recommends that its insights should not be excluded from post-analytic description. He believes, as noted above, that conversation analysis can be reintegrated with the (post-analytic) ethnomethodological programme. If conversation analysis drops its pretensions to an epistemological justification and analysis based upon a vision of the natural sciences, then reunification with its 'parent' should be relatively unproblematic.

scheme." (ibid:311).²

An important question for us here is what is post-analytic description all about? It is a mistake to struggle, as I initially attempted in this thesis, to try and produce a form of description that did not involve some form of analysis. This appears an almost impossible task, which in this research I initially attributed to the use of transcript data that did not seem to provide for the forms of demonstration associated with post-analytic ethnomethodology. However, while the transcription system used in this thesis may seem to be designed for conversation analytic use, this could not be the reason as it is only minimally so and very similar to that also used by Lynch and Bogen (1996). The production of description invariably invokes some analysis, and the result of my attempts in Chapter Four and Appendix Three has been the adoption of a description that is minimal in an attempt to avoid as much analysis as possible. This is a useful exercise to keep unwarranted theorisation to a minimum.

The solution to the problem, as has been mentioned above, is not to equate post-analysis with anti-analysis.³ I suggest that the way that we can best understand Lynch's focus on 'description', is not as 'anaemic' description appearing to contain little in the way of content, even if that is not a possibility in the first place.⁴ It appears to me that 'mere description', as Lynch ironically

² This may explain to some extent Garfinkel's refusal to discuss the philosophical background and justification for ethnomethodology, or any real precursors to speak of. The possible reason being to prevent the outlining of some epistemological framework to justify ethnomethodology, instead the justification is meant to be the studies themselves.

³ I am grateful to David Greatbatch and Martyn Hudson for pointing-out my use of analysis, and the pains that they both made in making me justify their inclusions in the 'description'. Without their insistence I doubt I would have managed to fully grasp what Lynch could mean by 'description'.

⁴ As James Boyd White (1984:6) notes in this regard: "Writing is never merely the transfer of information, whether factual or conceptual, from one mind to another, as much of our talk about it, but is always a way of acting both upon the language, which the writer perpetually reconstitutes in his use of it, and upon the reader. Action of this kind can never be wholly explained, and our talk about these things should reflect that fact".

refers to it, is not some reference to a form of representation that is devoid of any 'analysis', but is instead a reference to a representation that does not claim some epistemological justification or validity. The difference between the former and latter possibilities of what 'mere description' constitutes being very significant in the provision of such representations.

Lynch and Bogen (1996) note that their discussion of themes such as ritual, spectacle, ceremony and the use of the work of Foucault to set the agenda for aspects of their discussion does not mean that they have adopted a semiotic, structural or post-structural anthropology or such like. They acknowledge reference to the scholarship in these areas but that in doing so are not referencing some form of abstract framework for their descriptive interpretation. And to commentators who suggest they are, their response is:

"We are not denying that we must interpret the video tapes and written texts that make up our materials; we are, instead, denying that it is necessary to organize such an interpretation around a core theory or cognitive model." (1986:266)

They state that although they may on occasion invoke terms from some theory it is not to bring in a determinative theory, but to use them as figures of speech. They realise they may be seen as empiricists, reductionists, naïve realists, or behaviourist, by refusing to assign priority to an abstract model, ignoring context, and being apparently innocent of epistemological and moral propositions inherent in the understanding of any text. But reply that they are aware of these understandings of text and discourse, but equate their position on these as being that where "Wittgenstein was aware of their precursors when he divorced his conception of philosophy from the prevailing 'craving for generality' of his day" (ibid:269).

The point of the reference to Wittgenstein is not to reference a value-free form of description, but to note that Wittgenstein did not suggest this, instead equating his description with no special epistemological privilege at all (ibid:270). The difference between these two versions of description is that the

latter, unlike the former, is not claiming a privileged position from which to describe a 'generality'. The reason for avoiding this ascription being not that it is impossible to provide such a description, but that it is *too easy*. The cause of this being that "actual cases exhibit a surplus of detail that permits the ascription of an open variety of sometimes incompatible analytical categories" (ibid:171).⁵ A further problem arising "when a simple structure is given priority over the more complicated and seemingly amorphous relevancies of actual usage" where members become seen as cultural dopes acting in terms of "a theoretically specified arrangement of external forces and internal mechanisms" (ibid).

This stance by Lynch and Bogen does not allow any compromise between theory and practice to the extent that for them "even when they are finite and formally encoded, systems of laws and rules are continually reworked and inflected by reference to the occasions on which they are used. In effect, they become open-ended constituents of practice" (ibid:271-272). However, the aim is not to ignore such concepts as power, knowledge, meaning etc. but to examine them in their vernacular usage, avoiding causal explanation and the development of generalising explanatory schema. It may appear that my own work has fallen prey to this form of explanation but, I suggest it is following Lynch and Bogen (1996) who state:

"We are not proposing an inquiry free of propositions; instead, we are disclaiming that our inquiry is theory-laden in the sense of being framed by a professionally fashioned nexus of definitions, propositions, and a priori expectancies." (ibid:273)

It is an approach that attempts to explain its data without granting a single communicative theory foundational status, and is a post-analytic ethnomethodology "in the sense that we presume that, and selectively describe how, the sources of intelligible action and defensible judgement are not

⁵ This relates to my assertion of the possibility of multiple epistemic within occasions of phenomena.

contained within even the most elaborate system of prescriptions and specifications" (ibid:287). An approach which they doubt many social scientists would wish to follow. The question is, how have we interpreted this in this thesis.

I believe that what Lynch means by 'description' is something that might quite legitimately include what in another context are understood to be forms of analysis. At a simple level what I am suggesting is that post-analytic ethnomethodology may in fact legitimately contain what appear to be proto-ethnomethodological analysis, and yet still remain post-analytic. Post-analytic ethnomethodology, as we have noted above is not anti-analysis but rather post-analysis in that what it rejects are any foundational claims as epistemological justifications, when this is translated into the use of forms of analysis, the rejection is not necessarily the forms of analysis, but implicit foundational claims by their users. This is not due to a claim to a superior epistemological position, but reference to ethnomethodological studies of other disciplines, e.g. natural science, which have shown that these disciplines are constituted not by adherence to underlying epistemology (except when it comes to justification of 'findings'), but in the situated activities of the workplace, e.g. laboratory practices. These practices involve "bricolage expertise, ad hoc practices, improvisation, persuasion, persuasion, plausibility judgements, interfering with equipment, and so forth" (Lynch 1993:317). Post-analytic ethnomethodological practices are themselves constituted in a similar fashion. As Lynch states:

"The lesson that observation, representation, replication, measurement, and the like are 'locally organized' applies no less to the aims of social scientific investigations than it does to the lay and professional activities described and explained through such investigations." (Lynch 1993:311)

Of course post-analytic ethnomethodology must be engaged in such activities, but rather than being a problem, it is no more a problem than the equivalent practices are for the validity of science (this is where the strong programme and ethnomethodology differ). The only problem for science comes at the level of

justifying its practices with regards to some epistemological position which it adopts (or pays lip service to).

When it comes to post-analytic ethnomethodology, my understanding of 'description' and the one used in this thesis is not a the rejection of all methods or techniques of analysis. But rather the rejection of such an analysis to some epistemological justification which is claimed to legitimise the adopted methods. The important point here is that the adoption of a methodology and form of analysis has previously relied upon epistemological foundations for the validity of those methods and analysis. The post-analytic ethnomethodological position, as I understand it, is not that those methods or analysis are intrinsically problematic, but rather that their validity is claimed with reference to some external point outside of the situated activity which they are investigating is. However, I am not suggesting all sociological forms of analysis once removed of their foundational claims are suitable for use in ethnomethodological studies, as this is clearly not the case. But neither is it the case that because forms of analysis and description may be researchable epistemics themselves, that they cannot be employed by ethnomethodology itself. Though in what form they are employed will not be in relation to some foundational claim, hence although some form of analysis such as 'comparison' may be used, it will not be tied into some statistical justification for its validity. As Lynch notes, methods of description and representation adopted in respecifications are less privileged epistemic activities than those of science, but that they are also ones that constitute science but have been "orphaned" by theory and "need to be reclaimed if we are ever to make any sense of our scholarly endeavours" (1994:149).

Once deprived of any foundations and epistemological justifications it may seem that post-analytic ethnomethodology can make no claims for its descriptions. However, Lynch notes that this 'ascientific' approach of ethnomethodology is an extension of the later work of Wittgenstein, and that:

"Wittgenstein conducted investigations that he claimed were neither

explanatory nor grounded in a scientific method but that relied on the intuitive familiarity of ordinary language to a community of users." (ibid:313)

It would seem that this is where 'justification' must reside. But it must be said that this does not clarify how, or why, a description to be accepted. I suggest that answer is some form of intuitive appropriateness, though whatever it is it must involve a reflexive awareness of the impossibility of a foundational 'scientism'.⁶

Finally, I wish to note: firstly, that just as Lynch recommends that "Much of what goes under the heading of 'knowledge' in science studies can be decomposed into embodied practices of handling instruments, making experiments work, and presenting arguments in texts or demonstrations" (Lynch 1993:310). I suggest, that much the same argument can be applied to the heading of 'knowledge' in law, and the exploration of legal positivism in this thesis has been an attempt to describe it as such. Secondly, although Lynch's programme has been adopted as guiding the methodology of the research in this thesis, it has not, as described above, been followed to the letter. The 'spirit' of what post-analytic ethnomethodology is all about is probably best encapsulated in the follow quote from Lynch (Lynch 1988a:92):

"A truly radical break with traditional standards of scientific rationality requires facing up to the existential absence of transcendental standards for any claims that are made, and a willingness to 'fly by the seat of your pants' - to defer all but the most provisional outline of 'programme' until a body of investigative practices emerges in the social organization of the discipline. Such a coherent body of practices may never come to pass, and even if it does it will not offer any guarantees on the inherent rationality of the constituent activities. In any case, there should be no reason to fear falling into 'mere common sense' as a basis for inquiry, since 'common sense' can no longer be defined as the reciprocal of 'scientific rationality'. What 'it' might be remains to be discovered."

⁶ Lynch and Bogen (1996:286) note: "Our treatment of the hearings as a spectacle runs somewhat contrary to a research policy employed effectively in conversation analysis, which is to decompose events endowed with spectacular public significance into their mundane conversational constituents."

7.4 Legal Positivism as an Epistopic.

Part of the application of this research methodology of post-analytic ethnomethodology, apart from the provision of the description of practices and the view legal aid process that has resulted from this, was the investigation of epistopics and related 'themes'. Using these methodological insights from ethnomethodology we have been able to see that instances of decision-making do not necessarily attend to the statutory rules explicitly, that 'non-legal' forms of 'subjective evaluation' are incorporated, but that this does not mean that 'objectivity' has been sacrificed on the alter of common-sense evaluation. The adoption of the investigation of legal positivism as an 'epistopic', coupled with the descriptions provided by the research, have allowed us to re-evaluate the nature of objective legal decision making within the positivist/relativist debate. Through the investigation of this 'epistopic' we have been able to re-specify certain aspects of the notion of legal positivism, in particular the role that legal positivism plays in the proof-giving aspects of legal practice. Notably though, this did not indicate that such practices were any less legally adequate than others, but that their 'legality' and validity as tribunal processes must be seen as situationally organised and agreed upon by the panel members concerned. That the activities do not rule-follow in the classical sense but rather in terms of what the rules are meant to achieve. This is an issue that can be further developed not only in relation the theoretical jurisprudential debates about legal positivism and legal realism, but about how policy debates need to reconceptualise their understanding of the nature of legal practice.

At a very fundamental level this thesis has displayed how the actual practices of legal practitioners revolve around the manipulation of their documentation. These practices rather than being conceptualised in an abstract fashion of a logico-linear positivism representative of a fictional ideal practice, need to be seen as the reflexive construction of arguments towards locally situated coherent interpretation of the documents, and what the consequences

of various interpretations could be, and what the 'aim' of the tribunal system is. In the practices of the legal representative we saw that documents were utilised as support for a preferred 'goal', but that this goal was reflexive to the situated activities of tribunal hearing. How the documents were to be used could not have been stipulated in advance as the significance was only revealed and constituted as the tribunal activities of which they were a part unfolded.

7.5 Policy Implications.

The practical significance of this respecification of legal positivism and its rule-following approach to legal practice, can be seen in relation to the current proposals to abolish attendance by appellants and their representatives at Social Security Tribunals. This would transform the tribunals from their current position as allowing the possibility of dialogical decision-making to that of being purely monological and text-only based. This thesis has displayed the potential merits of the dialogical assessment of tribunal cases over monological assessment quite clearly. If this alone was considered it would seem proof enough, but when combined with a respecification of the nature of the legal positivist view of decision-making underlying these proposals it would suggest serious reconsideration of the reform of tribunals in this fashion.

If we look again at the Genn and Genn Report (1989) entitled 'The Effectiveness of Representation at Tribunals' commissioned by the Lord Chancellor's Department were the questions underlying the research were: "are represented cases more likely to succeed?; and, if so, what is it about representation that causes cases to succeed, or what is it about tribunals that renders representation necessary or desirable in producing successful outcomes" (ibid:4). They found that in all the tribunals examined the presence of a representative was found to significantly increase the probability of a successful hearing and that:

"The experience of representatives is that unrepresented appellants and

applicants are disadvantaged at tribunal hearings because there is an imbalance of power between the parties, because appellants and applicants do not understand the law, are unable to present their cases coherently and are unaware of the need to furnish the tribunal with evidence of the fact that they are asserting." (ibid:244)

What I suggest we can now see is that question of power imbalances, legal understanding and the provision of suitable evidence can to a large extent be seen as 'glosses' for situated activity as they manifest themselves in tribunals. These glosses indicated that some sort of 'related' practices can occur in attended and represented tribunals, but are unable to specify exactly what these may consist of. This thesis, and the ethnomethodological research that it has deployed, has been able to describe the actual practices which may have a large part to play in explaining the nature of these glosses as inevitable dependent upon situated activities in actual tribunals. Further, the respecification of legal positivism would suggest that some reconceptualisation of what the law is, and this does not necessarily mean legal relativism, needs to be undertaken. Only then will the right type of issues be raised in relation to the legal institutions and any policy developments for their reorganisation.

Finally, the complicated function of the documentary representations would seem to explain why attended tribunal cases are preferred by the tribunal panel over unattended case, that being for ease of understanding and interpretation of the phenomena. Of course, the extent to which each appellant can help in the interpretation of the documentation by the tribunal is not the same in each instance. The more skilled the appellant at understanding the needs and functions of the documentary representations the more likely, it can be assumed, they will be in assisting the tribunal.

Appendix One - Tribunal Venues

Venue One.

The location of this venue first case described here was a Legal Aid Board Area office. The tribunal was heard in a conference room in which the panel members and the Legal Aid Board clerk sat round a table facing each other. A tape recorder had been placed in the centre of the table whilst I sat back from the table at another table taking notes.

Venue Two.

This tribunal venue is a church hall in a moderately sized county town. The Legal Aid Board area office has procured two rooms for the proceedings: the first is used as a waiting room for attenders, the second as the room in which the tribunal hearings actually occur. The two rooms are connected by a short corridor. The tribunal room is set up so that the four panel members sit behind a long table which the appellants face.⁷ Next to the panel members sits

⁷ An interesting comment is made by Foucault on this form of spatial positioning: "What is this arrangement? A table, and behind this table, which distances them from the two litigants, the 'third party', that is, the judges. Their position indicates firstly that they are neutral with respect to each litigant, and secondly this implies that their decision is not already arrived at in advance, that it will be made after and aural investigation of the two parties, on the basis of a certain of truth and a certain number of ideas concerning what is just and unjust, and thirdly that they have the authority to enforce the decision. This is ultimately the meaning of this simple arrangement. Now this idea that there are people who can be neutral in relation to the two parties, that they can make judgements about them on the basis of ideas of justice which have absolute validity, and that their decisions must be acted upon, I believe that all this is far removed from and quite foreign to the very idea of popular justice." (p8) However, we are dealing with civil justice rather than popular. Foucault, Michel (1980), 'On Popular Justice: A Discussion with Maoists' (Chapter 1 in ..), 'Power/Knowledge', Hemel Hempstead, Herts. Harvester Wheatsheaf. (Originally published as 'Sur le justice populaire: debat avec les maos', in Les Temps Modernes 310 bis, 1972)

the Area Legal Aid Board clerk. I sat beside the attender.

Venue Three.

This tribunal venue is the conference room of a regional Law Society offices in a city. The work is all done in the one room and the attenders wait outside in the corridor to be called in. The door from the corridor leads straight into the conference room. The tribunal room is set up so that the appellant faces the panel behind a table, the panel being behind a row of such tables. The clerk is at ninety degrees to the left of the appellant, whilst the researcher is in the same position but to the right of the appellant but slightly set back.

Venue Four.

This tribunal venue was situated within the magistrates court of a moderately sized town and was a room whose usual function was a family court. When used by the tribunal none of the fixed furniture employed by the court was used, instead the loose fittings of tables and chairs were deployed to form a bench behind which the panel sat and which the appellant faced. The clerk sat alongside the bench at a ninety degree angle while the researcher sat at a separate table off to the side. Appellants awaiting their case hearing remained outside the room where sitting was provided.

Appendix Two - Transcription Method and Abbreviations.

cl = Legal Aid Board Area Office Clerk

ch = Chair of Appeal Panel

pm1, pm2 and pm3 = Panel Members

? = Unidentified Speaker

ap = Appellant

s = Solicitor

m = mother

(0.6) = numbers in parentheses equate to the approximate length of pauses in seconds

(.) = a micro-pause of less than two tenths of a second

[= the start of overlapping talk

(words) = words or phrases in parentheses denote unclear recorded talk

Written transcripts are textual representations of natural language, while written texts are influenced by natural language, the textual conventions transform the natural language when it is represented in a textual format. This is indeed also the case with transcripts presented here. Here the format, one among many possible, is based upon that devised by Gail Jefferson for conversation analysis and adopted by much of ethnomethodology, although in a simplified form. Pace, pitch, pronunciation and stress have been omitted as unnecessary to the descriptive needs of this thesis. As Watson (1997)⁸ has noted there are conventions here which affect the presentation of natural language. These include the larger cultural conventions of reading from left to right and top to bottom, but also designation of the speaker in the left column. The designation of speaker is an interesting point as that is designated by the

⁸ Observations on the effects of transcription on interpretation of data are noted by Cicourel (1975) who also notes that the researcher with access to the audio tapes is a more advantageous position than the reader of the transcript only.

researcher and as such instructs the reading of the transcript. There is no guarantee that the designations used by the researcher are the ones seem as appropriate by the members themselves, or that such designations are even static throughout an encounter. Watson states:

"We might say that the very transcriptions they produce do persuasive and predisposing work before the ethnographic analysis per se really begins, and indeed, risks introducing an artificial element into that ethnographic analysis. In a strong sense, the ethnography is done before the transcribed data are analysed: once the categories are provided, a predisposing interpretation is potentiated and it is 'all over bar the shouting'." (ibid:84)

This, however, may be overstating the effects, which must also be dependent on what the analysis is doing. I believe that the data itself should provide some sort of corrective to the effects of these determinations. My preference would be the provision of the tapes themselves to the reader, however, the multimedia presentation that this would be beyond anything feasible with this study and its inherent limitations.

The practice of law can be seen as disciplinary in the double sense as both a body of knowledge and as a technology of control, and, as is illustrated in Foucault's 'Discipline and Punish', this is not a power-neutral form of control. The discourse of a positivist notion of law developed in the discipline of law may be seen as an attempt to appear power-neutral, in borrowing the visage of scientific neutrality and objectivity in its applications. Although this thesis does not develop this issue, the question of the decline in the image of the scientific view of the world, may be expected to affect any discipline which has adopted the same discourse in its attempts at gaining and holding social authority.

Appendix Three - The Data Transcripts and Descriptions.

The following data transcripts and descriptions presented in numerical case order as in the main body of the thesis. The first two cases that have their descriptions presented in Chapter Four are presented here only in transcript form. For the rest of the case their are full descriptions following each transcript with summaries of the descriptions following each of them. Due to the length of Case Five it is presented in three segments, the first segment contains phases one and two of the tribunal, the second contains phase three, and the third that of phase four.

Case One⁹ - (Venue - One see Appendix One Venue Number One.

1 cl :Right we'll make a start (0.2) would you care to appoint a
2 chairman?--
3 ? : [we have done (0.4)
4 cl :and that is?
5 ch : [I I got lumbered I'm afraid (.)
6 cl :(name) is the chairwoman (.) alright (.) okay (0.4) one (name of
7 appellant) (2.0) (cough)
8 ch :have we got a PI specialist amongst us? (.) you are aren't you?
9 pm2 : [no
10 (.) well not really but I
11 ch : [oh [I thought you did some
12 pm2 : [I thought erm
13 (0.2) I thought there was something quite (.) quite serious here (.)--
14 ch : [yes
15 pm2 :-and that she ought to certainly have legal aid for (.) a medical
16 report and then counsels opinion (.)
17 ch :yes that was my my view as well (.)
18 pm3 :I I felt the same I thought primi facie there appeared to be a case
19 of negligence (0.4) and there ought to be (.) a grant (0.2) for a
20 medical report from doctor (name) and for counsel's opinion (0.8)
21 ch :I mean I felt the quantum was (0.2) quite substantial (0.4)--
22 pm2 : [might well
23 -be (.)
24 ch :-if they got home on liability (0.2) errm I felt (.) not able to (.)--

⁹ Data Session 1 tape 1 case 1.

25 pm3 : [yes
 26 pm2 : [yes
 27 ch :-comment on the medical side because it does seem horrendously
 28 complicated and there is all sorts of different medical conditions
 29 (.)
 30 pm3 :that's right (.) but we had no actual medical report before that-
 31 pm2 : [umm
 32 ch : [no
 33 pm3 :-did we (0.2) so
 34 ch : [no I thought that errr that was unfortunate omission but
 35 perhaps there isn't one (.)
 36 pm3 :because lack of medical report we can only talk in general terms-
 37 pm2 : [umm
 38 pm3 :-I thought (.)
 39 pm2 :yes (.)
 40 pm3 :erm (.) there seemed prima facie there was a case (2.0)
 41 ch :do you agree with this (name of)? (0.2)
 42 pm1 :well speaking as the err divorce specialist it looked like a good
 43 PI claim to me (.)
 44 pm3 :(laugh) (0.8)
 45 pm1 :yeah (.) I mean its if it is going to go home on liability it is
 46 certainly going to go over a thousand in damages (unclear) (.) by-
 47 ch : [(unclear)
 48 pm1 :-a street (.)
 49 ch :I think it's seven thousand for loss of life isn't it? (0.2) they (.)
 50 (clerk's forename) can probably help us on that (0.2) plus uh (.) -
 51 pm? : [yes
 52 pm? : [mmm
 53 ch :-a lump sum
 54 pm3 : [bereavement damages you mean (.)
 55 ch :bereavement damages yes (.) plus the pain and suffering that the-
 56 pm? : [ummm [ummm
 57 ch :-child obviously experienced (0.2) throughout his life so I would-
 58 pm? : [(unclear)
 59 ch :-think that it's a very substantial claim (.)
 60 pm1? :yep (.) so I would say (.) we should grant it (.)
 61 ch :can we give a limited certificate for medical reports counsel's
 62 opinion on merits (.) please (clerk' forename) on that one (5.0)
 63 cl :okay (.) err which takes us on to err six (4.0)

Case Two¹⁰ - (Venue - See Appendix One Venue Number Two).

shuffling of paperwork as previous case vacates the room

1 cl :Neil you're ok for the next one too (0.4)

2 pm1 :is (unclear) around (.)

3 cl :yes (2.0)

4 pm3 :is this number two (0.2)

5 cl :(appellant's name) yes (5.0)

6 ch :now in the normal way we we (.) we look at this in case (.) we

7 have formed a view of reading (.) on this occasion we have got (.)

8 quite a lot of paperwork (2.0)

9 pm2 :counsel's er put a lot of doubt on it (unclear) unless he comes up

10 with that (.) gets us him over that hurdle (0.4) he must fail (0.6)

11 ch :right (.) then I think we can do no better than have him in (.)

12 cl :okay (35.0)

13 Clerk leaves the room to get the attending appellant

14 ch :good opinion isn't it (0.4)

15 pm2 :yeah (20.0)

16 Clerk returns from waiting room with appellant

17 cl :(unclear) (.)

18 ap :okay (1.4)

19 cl :please sit down mister (name) (.)

20 ap :thankyou (5.0)

21 ch :mister (name of clerk) are you going to

22 cl :mister (name) you had (.) legal aid (.) err last year to enable you

23 to (.) be represented in the case involving (company name) (.)

24 ap :yes (.)

25 cl :err the legal aid certificate has been discharged by the (.) legal aid

26 board staff you are now (.) exercising your right of appeal to the

27 area committee this afternoon (.)

28 ap :umhuh (.)

29 cl :err the members of the committee who are here this afternoon

30 who are all (.) quite independent of the legal aid board have had

31 a chance to consider the papers (.) they'll have some papers er

32 they'll have some questions for you and you can add what you

33 wish afterwards (.) the committee have had the counsel's opinion

34 of the 4th of november (.) err your notice of appeal (.) a letter ff

35 (.) from you dated the 9th of january (.) and various other papers

36 (0.4)

37 ch :mister (name) my name is (name) I'm sitting with mister (name)

38 on my right (.) mister (name) and mister (name) (.) erm as mister

39 (clerk's name) has said we've read errm (.) a statement (.) that you

40 gave (.) errm (.) which is (with us) (.) the helpful background you

¹⁰ Data Session 9 tape 1 case 2.

41 (.) give the (0.2) reasons (.) (in this) the statement (.) that
 42 accompanied your application I believe (.) you gave five reasons
 43 why (.) you (.) felt that the err the (.) court judgement should be
 44 set aside (.) you then got (.) mister (name) I think his name is his
 45 opinion (.) errm which is (.) err though you describe it a interim
 46 opinion it is (.) fairly (.) conclusive in my personal view but that
 47 is dated the 4th of November 1994 (0.2) und then we have a
 48 statement from you (.) erm regarding the notice of appeal (.) erm
 49 and a further letter mister (clerks name) said (.) now as I say we
 50 have read all that (.) perhaps (.) err the way we should handle the
 51 appeal if for you to (.) add to those grounds if you want to (.)
 52 we'll then ask you questions so perhaps you'd like to shoot away
 53 (.)
 54 ap :(cough) I don't think I have anything to add to the statement (.)
 55 ch :nothing at all? (.)
 56 ap :no (.) I mean it's it's all set out there (.) and and I don't think
 57 there is any point in adding anything to that (0.2) I I obviously
 58 don't agree with you in in respect of the (.) of thee barrister's
 59 opinion (.)
 60 ch :in wha: have you got a copy of there (.)
 61 ap :yes I have (.)
 62 ch :well sh.shall we refer to it because I think that it's quite important
 63 that we don't get (.) at crossed purposes on this (.)
 64 ap :okay
 65 ch :cause after all it's on the basis of this appeal that urm (.) legal aid
 66 is withdrawn (7.0)
 67 ap :I:I thought I'd actually (referred to): in in the barrister's opinion
 68 he asks for some further information (.) from thee (.) uh (.) two
 69 directors of the company concerned (0.2)
 70 ch :can (.) can you point to them now (33.0)
 71 ap :I'm not sure I've found it (35.0) in twenty nine is it is he talks
 72 (0.4) about thee err (0.4) assertions and (.) evidence before them
 73 to support the third defendant's contentions (4.6)
 74 ch :you being a second defendant (.) they're saying "those instructing
 75 you should contact the person pertinent for (unclear) cite all the
 76 evidence in the possession of the defendants" (0.2)
 77 ap :and I'd I'd obtained that additional information which the barrister
 78 hasn't seen (.)
 79 ch :I see (0.4)
 80 ap :and what I was asking was (.) that he could see the additional
 81 information (.) that I have obtained (.) since he he wrote his report
 82 (.)
 83 ch :so really (.) that (.) you're really hanging your appeal on that
 84 point particularly? (0.4) is that right you're not challenging (.) the
 85 other points (.) in thee eh
 86 ap : [well (.) the appeal to you as far as I

87 understand which is in in respect of (.) allowing me to go back to
 88 the barrister so that he can complete his opinion (.)
 89 ch : [okay
 90 ch :right (0.4)
 91 ap :in terms of the appeal against the whole case th.that this is not up
 92 to me to talk to you about today (.)
 93 ch :quite (0.2)
 94 ap :I mean if I'm wrong I mean
 95 ch :no no that's fine mister (name) that's that's actually quite helpful
 96 (.) that we've narrowed (.) we've narrowed the issue down I mean
 97 (0.2) lets just deal with it on that level to start with (.) see if we
 98 can not
 99 ap : [and the other thing that I should say is the statement I have
 100 made was actually drafted between my solicitor and I (.)
 101 ch :yes sure (.) yes (0.2)
 102 pm? :I have nothing else (.)
 103 ch :okay (2.0)
 104 pm2 :I can anticipate what your answer will be but this additional
 105 information that you've found is it encouraging (0.2) do you feel?
 106 (1.4)
 107 ap :yes a do (2.0)
 108 pm1 :I notice (.) on the (.) statement in support the err notice of appeal
 109 that a (.) bundle of additional evidence was submitted with that (.)
 110 err we haven't seen it (1.0) including of course the comments from
 111 the legal aid board (.) and er how extensive that (.) bundle is
 112 which (unclear)
 113 ap : [well that's that's the bundle that was sent to the legal aid
 114 board (1.5)
 115 ch :hhhhh (0.4)
 116 pm1 :donno what (.) what (.) we could consider today (1.0)
 117 ch :that addresses the err point (unclear) that if we if we turn to
 118 paragraph (.) paragraph thirty in (account) (.) the final closing
 119 paragraph (.) he sez that "in my opinion unless the second
 120 defendant is able to establish the plaintiff failed to mitigate its loss
 121 or actively worsened it by failing to secure satisfactory (unclear)
 122 was carried out or a fair price was obtained (0.6) err then no
 123 prospects of setting aside the judgement" (unclear) (.) though I
 124 take it that the additional evidence you've been able to produce
 125 addresses that particular flaw
 126 ap : [yes it does (.) the oth: the other two
 127 defendants are (.) are directors company that actually borrowed the
 128 money I'm not (0.2)
 129 ch :fine (.)
 130 pm2 :the there's also the question of contr: seeking contribution from
 131 the other (.) two defendants (mumble) (0.2)
 132 ch :good (.) okay (.) thank you very much (.) have you any other

133 questions? (0.4) no (0.2) fine mister (name) if you'd like to (.)
 134 (wait) out side (.) you can leave your papers here if you like (.)
 135 leave your coat (.) sorry (0.2)
 136 ap :thankyou (11.0)
 137 pm1 :counsel's opinion (0.2)
 138 pm2 :well I'd agree (mumble)
 139 pm1 :counsel's opinion (.)
 140 pm3 :that's me (.)
 141 ch :well he's done it he's set aside thee eh (.) he's set aside (1.4) well
 142 to his satisfaction anyway (laughs) err counsel's erm (1.0)
 143 (unclear) (haven't they) (.)
 144 pm2&3:yeah mmmm
 145 pm1 : [if he's got the other evidence (.)
 146 ? :(mixed talk) counsel's opinion
 147 pm3? : [that was my initial reaction in this case
 148 cl : [okay right
 149 I'll get him back in now (1.8)
 150 ch :good good okay so now can we limit (.) the certificate here to
 151 obtaining (.) counsel's further opinion (.)
 152 pm1 : [(unclear)
 153 cl :yes certainly (.)
 154 pm2 :oh yes I think that's (unclear) (2.0)
 155 ch :okaayy (1.0)
 156 cl :thankyou (34.0)
 157 clerk leaves to get the attender and then returns
 158 ch :thankyou for coming today mister (name) (.) it's always (.)
 159 very good to see an appellant rather than do it on paper (.)
 160 ap :well I'm sorry you didn't have all the papers I just
 161 ch : [no no no you
 162 don't (.) no no (.) you've satisfied us (0.2) you should have another
 163 opinion from (barrister's name) (.) therefore you certificate will be
 164 (.) I don't know what the word is renewed here or or the appeal
 165 granted (0.2)
 166 cl: :discharge rescinded (.)
 167 ch :discharge rescinded (.) I'm obliged to (name) I haven't got the-
 168 pm1 : [hohoha!
 169 ch :-eh (.) the correct eh (.) discharge will be rescinded erm but
 170 the certificate will be limited to obtaining (barrister's name)'s
 171 further opinion (.)
 172 ap :thankyou (.)
 173 ch :thankyou very much goodluck (.)
 174 ap :okay thankyou (0.2) that's a relief (1.8) happens to be my
 175 birthday today sir it must be a good omen hhhuhhuh
 176 ch : [well there you
 177 are (0.6) we couldn't say more than that (.) could we except
 178 happy birthday (.)

179 ap :yes thankyou (2.8)
 180 ch :righhht
 181 cl : [you're in for the next one too neil (.)
 182 ch :what is the next one? (.)
 183 cl :the next one is (appellant's name) this is this erm (.) family
 184 matter where they've (.) come down from (place).....

Case Three¹¹ - (Venue - See Appendix One Venue Number Two).

1 ch :right (.)
 2 cl :(reference by clerk to researcher access to case)
 3 ch :the next one (.)
 4 cl :the next one is (name of appellant) (.) this is this family matter
 5 (.) they have come down from (town name) in (unclear) 22nd (.)
 6 pm1 :I I was minded to grant it (2.0) (any takers) (0.6)
 7 pm2 :my comment about this I made uhh (.) a bit outside my field (.)
 8 was about adoption (0.4)
 9 pm1 :there's a possibility that they'll go that route isn't there (.)
 10 pm3 :very rarely now
 11 all : [(unclear as all talk at once)
 12 pm3 :it's very rarely (.) they go through that route to be (unclear) (.)
 13 children act would (.)
 14 ? :mmmmh
 15 ch :yes (.) children yep (.) that would be exceptional (.)
 16 pm3 :if it's it' right that he can't (.) sort the (unclear) to qualify or
 17 getting a grant or resposibilty order because he's erm (.) (remarried)
 18 father of the child (.) erm (unclear)
 19 pm1 :what's (unclear) like (0.2)
 20 ch :sorry (.)
 21 pm1 :what was your view of it (.)
 22 ch :well my view was basically that I didn't think it was necessary
 23 (0.2)
 24 pm1 :hummmh (0.2)
 25 pm3 :my personal inclination would be to dismiss it (.)
 26 ? :humh
 27 pm2 :the problem is if he's he's looking to the future in a way I mean
 28 if (.) if the mother dies (.) or if anything happened (.) then (.) the
 29 child may be whisked or likely to be whisked away by her natural
 30 father (he's) left (0.2)
 31 ch :yes (.) unclear (0.4) I'm at a loss to understand (.) and I I I (.)
 32 they are not represented are they (.)
 33 cl :no (.)

¹¹ Data session nine tape one case three.

34 ch :I'm at a loss to understand why a second application's needed (.)
 35 ? :(unclear) (0.4)
 36 ch :well let's have them in (unclear)
 37 cl :okay (clerk leaves to get appellants) (10.0)
 38 pm3 :(unclear) on that point (.) if she made the will (.)
 39 pm1 :appointing him as guardian (.)
 40 ? :yeas (.)
 41 ch :it's very simple (.)
 42 pm3 :(unclear) worry about what happens (unclear) (.)
 43 pm2 :that's his worry (.) he expresses it somewhere in the papers (35.0)
 44 ch :would you also pay a (maintenance) order (0.2) if you knew
 45 (someone) was married (1.0)
 46 pm2 :(court could) technically (ingnore?) her (2.0)
 47 pm3 :quite likely to (.)
 48 ch :how how can we (hear) (.) I I I've touched on perhaps (.) I don't
 49 know (.) she may reside with the mother and this chap (.)
 50 ? :hmmhuh (.)
 51 ch :errm (.) another (unclear) and residence order (.)
 52 pm2 :because she's not at home (.)
 53 ch :she doesn't need it (.) then with him doesn't he need it ((0.2) I
 54 can't I can't see (.) I mean forgive me I can't (.)
 55 pm3 :technically it would be the only way that you could get (.) some
 56 sort of parental (.) right's for the future (0.2)
 57 ch :(unclear) (0.2) I only (unclear) (.) a court which is not going
 58 admit him (unclear) (.) is it going to give him (unclear) (0.8)
 59 pm3 :well it depends on opinion at the end of the day (.) if if the
 60 natural father turn up and objects and (unclear) (.) then they are
 61 much more likely to
 62 ch : [yeas yes well (.)
 63 pm1 :hummh (0.8)
 64 ch :I'm (.)
 65 pm3 :she's trying to restrict contact isn't she (.)
 66 pm1 :she's trying to restrict contact (0.2)
 67 ch :upon that (unclear) (.)
 68 pm3 :no that's not not going to happen (unclear) no I mean his his
 69 position from (unclear) both mother and father are battling
 70 (unclear) (3.0)
 71 Discussion stops as the clerk and attenders enter the room.

This case follows straight on from the attended case (case two) of the previous chapter. The Chair using the term "right" signals that something is about to happen (line 1), and before continuing the clerk indicates to the researcher that they have access to the case and do not have to turn the recorder off and vacate the room (line 2). Then the chair continues indicating the start

of the next case by asking for/about the case (line 3), to which the clerk responds by giving the name and a brief description of the case (lines 4 and 5), paraphrasing details from their documentation. At this point panel member one gives their opinion of the course of action to be taken which they decided upon on in their reading prior to the panel meeting (line 6), this too appears to be a paraphrasing, this time from the notes made by the panel member in their reading of the case notes. It seems, although it is not too clear, that the panel member then offers this up for acceptance by the rest of the panel. Panel member two (lines 7 and 8) does not take up the offer to comment on whether the case should be granted legal aid, instead he directly refers to a comment they have made about the case in their prior reading. Thus panel member two moves the discussion away from the immediate decision on the case as whether to accept or reject the appeal, raising the issue of adoption for discussion.

Following the comment about the issue of adoption, discussion takes place between panel members one and three and the chair, in which panel member three argues that adoption would not be the likely route to be taken by the appellants (lines 9 to 20).¹²

Panel member one (line 9) in adding to panel member two's comment (line 8) hypothesises about the next actions of the appellants, but is contradicted by panel member three (lines 10, 12 and 13). The chair then agrees with panel member three (line 15), who then goes on to also talk about possible actions available and unavailable to the appellant (lines 16 to 18).¹³ What is unclear here is whether these details are in the documents or not, what is clear though is that this information is not taken up for discussion by the panel. As panel member three's talk tails off (line 18) the topic is not taken up by the other

¹² The move to the next 'phase' does not happens in this case, the possibility of 'closure' is not taken up, rather a second line of discussion, the issue of adoption, is raised.

¹³ Unfortunately some parts of the data are unclear, although this is not just a problem with the recording as some it appears to be unclear to the participants.

panel members, instead panel member one (line 19) asks a direct question of the chair who does not hear it clearly (line 20).

Panel member one repeats their question and asks the chair for their view of the case (line 21), and the chair responds that their view of the case was that the proposed action by the appellants was unnecessary (lines 22 and 23). After a brief acknowledgement of this by panel member one (line 24), panel member three then gives their opinion of the case as being to dismiss it (line 25) - this too is acknowledged (line 26).

Once this split in the panel is made clear panel member two, who made the initial suggestion of granting the appeal, gives an explanation derived from their personal reading of the documents (lines 27 to 30). He does not appear to directly quote the documents and his opinion, which can so far only have come from their prior reading of documents for case facts, will be informed by member's knowledge, both lawyers and everyday, of the appellant's reason's for seeking the action applied for. The extent to which this is supposition or actually contained in the written documentation provided for the panel is not made clear. The Chair responds to this, breaking the statement with a request to the clerk as to whether or not the appellant is represented by a solicitor (line 32), that they still do not see why the action is necessary (lines 31 and 34). Why the chair is interested at this point in whether the appellant has representation is not explained, though in framing what to ask the appellant it is obviously important for the chair to know whether they will be addressing another lawyer or a lay person.¹⁴ Once this statement is not taken up in any clear fashion (line 35), the Chair then decides to have the appellant in and requests that they be brought in (line 36), this is acknowledged by the clerk one of whose tasks is to collect the appellants (line 37), thus bringing phase one to a close.

The talk continues after the clerk leaves with panel member three asking about the point made by the chair about making a will (line 38). This statement is finished by panel member one (line 39) and appears to be agreed with by the

¹⁴ This distinction can not be taken simplistically by the chair as occasionally lay people are knowledgeable about the law relating to their own case.

others (line 40 and 41). This is the chair's point that court action is not needed as a will would suffice. Panel member two seems to raise some possible worries, although it is not clear whether this is in general or for this particular appellant (line 42). Panel member two states that this sentiment has been expressed by the appellant in the documentation (line 43), although it does not elicit any action by the panel to find the statement in their documents and is in fact followed by a long pause. The chair continues after this to discuss some technical points about maintenance orders (lines 44 and 45).

Summary.

From the written documentation the clerk gives a brief description of the case, the objects of work here being the documents that the panel members all have, each having received identical bundles. These bundles do not remain identical however in that each panel member tends to make notes which are either added to their own bundle or written directly onto them. It is such a comment that panel member two is directly referring to (lines 7 and 8 case 1) when noting his opinion. So we can see that in this case it is via the documentation and reference to it, that a start to this particular case hearing is made. Not, of course, that this is achieved in the same fashion each time. In this case we can see that such phrases as 'I was minded' and 'my comment about this' (see lines 6 and 7) seem to indirectly refer to this process. However, whereas in the introductory full transcript the offering of an opinion of the case led to the early ending of the first phase and moving on the second phase, in this instance discussion carries on.¹⁵

Once the suggested option of granting the appeal by panel member two

¹⁵ From attended case (case two) chapter three, lines nine to eleven.

9	pm2	:counsel's er put a lot of doubt on it (unclear) unless he comes up
10		with that (.) gets ushim over that hurdle (.) we must fail (0.6)
11	ch	:right, then I think we can do no better than have him in (.)
12	cl	:okay (35.0)

(lines 7 and 8) is not taken up, the discussion moves to hypothesising about future action, action not given in the documentation. This hypothesising was met by rejection and eventually led the discussion to a halt and change of direction.¹⁶ Whether it is unsuccessful because it has not remained grounded in the documentation it is not possible to say.

It then becomes apparent why the suggestion by panel member two to grant the case was not taken up, and why the case did not move on to phase two immediately, as in Case Two. The reason being that the panel are split on their opinions of the merits of the case and also, the chair, whom would 'usually' make the suggestion of a move to the next phase is against granting the appeal (line 22). Also, the clerk, who could move to the next phase by volunteering to get the appellant, does not read the situation as being that the panel are ready to move on to discussing the case with the appellant. A reason being that since the panel have not agreed to grant the appeal they have not decided upon what issues to discuss with the appellant as an alternative to granting immediately. As soon as the panel have a question to ask the appellant they invite the appellant in, though the question is not formulated as such, but rather a response being required to the chair's twice made statement of being at "a loss to understand" (lines 31 and 34).

We also see in this case the use of the transition period between phases for discussion relating to the case. Much of the technical discussion is unclear but it seems to be a period of clarification of aspects of the law which various members are not familiar with. Panel members are often specialists in areas not pertinent to a case and unfamiliar with the rules that are. The use of hypothetical possibilities in the discussion are used to guess at possible outcomes of various actions in court. This seems to be a move away from the evaluation of the documentation contents in and of themselves and to display their essential indexicality.

¹⁶ The way in which this was dealt with and produced had much in common with what Kuhn (1981) describes as a thought experiment, although an unsuccessful one.

Case Four¹⁷ - (Venue - See Appendix One Venue Number Three).

1 ch : (unclear) been in prison now released and he would like (0.2) err
2 (.) he would like erm (.) access or whatever it is called nowadays
3 (.) to his (.) to his err two (0.2) natural children his own children
4 (4.0)
5 pm1 : we ought to have expert evidence (unclear) (1.0) reluctant to see
6 him embark upon (3.0) application until know what we've got
7 (unclear) (4.0)
8 pm3 : do we know how old theeeh (2.2) step daughters (.) were (.) or
9 are or (.)
10 cl : errrmh (8.0) I don't believe we have (.) if you will bear with me
11 (1.0)
12 ch : actually he wants to have (.) err (.) he doesn't just want to launch
13 one set of proceedings does he (.) he wants to have contact contact
14 with his sons (.) who live outside (city name) somewhere and he
15 also wants to have (.) supervised contact with his son (name) who
16 lives with his mother in (city name) (.) she too has denied him
17 contact (.)
18 pm3 : mmmmh (5.0)
19 ch : there are a lot of these cases going through (.) err the courts now
20 (.) one sees them (.) all the time in (place name) at any rate (.)
21 where fathers who have absolutely hopeless cases (.)
22 pm3 : ummm (.)
23 ch : eh pursue them with legal aid and the local authority (.) and the
24 guardian err defend at immense public expense (.)
25 all : ummmh (.)
26 ch : an the judges complain all the time that legal aid shouldn't be
27 granted (.)
28 pm3 : yep (0.4) yes and the problem is you you once you open the door
29 a lot of people are going to go through it all with legal aid
30 certificates
31 ch : [yes
32 pm2 : [but surely (unclear) on this to get psychiatric report and
33 opinion (.)
34 ch : he's been refused at the moment on the basis that he hasn't got
35 reasonable prospects of success (.) and (apart) from the fact that
36 the child's welfare is paramount (0.2)
37 pm1 : the trouble is (0.2) given (unclear) to get (unclear) is almost
38 certainly going to be favourable (0.2)
39 all : well
40 pm3 : [well well (name of solicitors) who are involved are very
41 experienced (.)

¹⁷ Data Session eight tape one case one.

42 pm1 : (unclear) no we'll we'll give him some support then if he gets a
 43 favourable (unclear) we're then allowed to erhem (.) extend (our
 44 services) (.)
 45 pm2 : but if there is (0.2) a reasonably respected psychiatrist who is
 46 willing to put his name it (.) surely he's got a (eligible) case (0.2)
 47 ch : how old are these boys do we know it isn't in the papers that
 48 we've had (.)
 49 cl : we (.) we (.)
 50 ch : they presume we do know do they (.)
 51 cl : yes (.)
 52 ch : how old are they (0.2)
 53 cl : the son (name) is (age) (0.2) (name) is (age) there is there is
 54 another child (.)
 55 all : (child's name) (.)
 56 cl : (child's name) (.) who is (age) (0.2)
 57 ch : yes (.)
 58 all : (unclear) (name) and (name)
 59 cl : I don't have the inf (.) I don't have that information no (.)
 60 ch : he actually want's to (make) two (.)
 61 cl : yes (.)
 62 ch : two claims doesn't he
 63 cl : [two applications yes
 64 pm2 : [when did he (see) do you know when he
 65 last saw (name) and und (.)
 66 ? : (unclear) (4.0)
 67 pm1 : right I think (unclear) that he was seeing (name) then mother
 68 turned him down
 69 pm3 : [yes it does rather suggest that doesn't it (.)
 70 pm1 : when er er (.) the other problems arose (.)
 71 ch : but he lives in (place) (1.0) what sort of contact can he have had
 72 with his son in (place) (0.2)
 73 pm2 : well we can ask him that couldn't we
 74 ch : [hmmm (0.2)
 75 pm3 : he's now living in a probation hostel (4.0)
 76 ? : what is (treatment)
 77 pm1 : [treated by a psychologist I mean how permanent is
 78 such treatment likely to prove I mean (.) is he still is it on going
 79 I mean (.)
 80 ch : well he hasn't done any naughties to any boys (0.2) heh heh he's
 81 quite normal in that respect (.)
 82 ? : hmmmh well (.)
 83 ch : it's only with (names) that he's been errm (.) interfering (.)
 84 pm1 : mmm (1.0) I'd love to know how old (names) are (.) and if they
 85 are teenagers (0.4) it might influence one's decisions to the the risk
 86 (0.2)
 87 pm2 : well let's see what he has to say to me (.) I mean I must say I

88 don't have a lot of sympathy but (unclear)
 89 pm1 : [I start from I start from the
 90 same (.) ground but (.)
 91 pm2 :the work here (.) justifies the investigation (3.0)
 92 ch :seems to me its going to take awful lot more (.) a lot of legal aid
 93 money (unclear) (.)
 94 all :(unclear)
 95 ch :and cause enormous pain and upset to the children and the
 96 mothers (.)
 97 pm1 :and if the mothers absolutely determined that he won't have it
 98 anyway (.) effectively she will stop him I mean she will just say
 99 I am not doing it and the court can do what it likes (.) the court
 100 is not going to take the children away from her (.) because it
 101 won't let her have contact with the step father (.) so eh
 102 pm3 : [couldn't
 103 really blame the mother for taking that action either
 104 pm1 : [no I beg your
 105 pardon (.) father I'm sorry father (.) not step-father (.)
 106 ch :children going to (.) horrible (that's right)
 107 pm1 :and if the boys are living with the girls in question (.) which they
 108 are according to that (.) going to upset the whole family unit
 109 pm1 :(0.2) I'm very (.) very
 110 pm2 : [well well I (.) suppose we take all this
 111 into account see what we act (unclear)
 112 pm3 : [see what he sez see what he sez (.)
 113 pm2 :I'm not sure whether that' enough to deny him the question (.)
 114 ? :hmmm
 115 pm1 : [that's the problem isn't we are in a sense putting ourselves
 116 in the position of (.) errm
 117 ? : [judging
 118 pm1 : [judging the case almost (2.0)
 119 ch :I suppose we have to do that to some extent
 120 ? : [hmmm (.)
 121 pm3 :well when you are rationing money (.)
 122 ch :yes (1.6)
 123 cl :shall I ask (unclear) (.)
 124 ch :yes please (.) thank you (name of clerk)
 125 cl :(unclear)
 126 ch :sorry about that (1.0) hello (name of appellant)

What we can see in the first instance (lines 1 to 4) is the chair
 summarise what the appeal is about. After a four second pause panel member
 one says rather tentatively that the panel ought to have some expert evidence
 about the case (line 5), and that they are reluctant to see the appellant embark

on the action until the panel have some further knowledge about the appellant (lines 5 to 7). The first panel member has suggested that they require further information, and after another four second pause (line 7) panel member three asks if they have information as to the age of the two step daughters, either their age at the time of the offence or (possibly) now (line 8 and 9). It seems that the panel are not willing to give a decisive opinion and are trying to get further information on the case. The clerk responds that they do not believe that the requested information is available but asks the panel member to wait while he looks through the documents (lines 10 and 11) - the clerk's having additional documents to the ones the panel members have. At this point the chair makes the observation that the appellant actually wants to "launch" two sets of proceedings for two different sets of children with different mothers, and indicates that both have denied the appellant access (lines 12 to 17). This is met with neither definite confirmation or negation by panel member three (line 18).

After a five second pause (line 18) during which the clerk does not respond to the request for information on the age of the step daughters, and no one else offers any opinions, the chair then broadens the topic of discussion out beyond the individual case a hand but in a way that is directly related to it. The chair (lines 19 to 21) states that there are a lot of similar cases to this one going through the courts, but qualifies this to courts in their area, where fathers have "absolutely hopeless" cases. This is met with some form of token agreement from panel member three (line 22), the chair goes on to state (lines 23 and 24) that these are pursued with legal aid and defended at "immense public expense", a statement agreed to by the rest of the panel (line 25). The chair carries on to say that the judges themselves "complain" of these cases that legal aid should not have been granted (lines 26 and 27). This stance is 'reinforced' by the follow-on statement by panel member three (line 28 to 30), also at a general level, who after agreeing with the chair states that once one person does this with legal aid a precedent is made and others follow through "all" on legal aid. The chair has adopted a very indirect move against the case, in many ways this leaves him much room for manoeuvre but why he has adopted such a tactic is

not clear.

However, just as this is being met with approval from the chair (line 31), panel member two brings the discussion directly back to the case by what seems to be a suggestion that what is needed is a psychiatric report (lines 32 and 33). The chair then states, apparently reading from the documentation, that the reason that the case was originally refused legal aid was due to lack of reasonable prospects of success and the welfare of the children (lines 34 to 36). Following this panel member one seems to express some concern over the suggestion of obtaining a psychiatrists' report (line 37 and 38), apparently the concern is due to a perception that it would be favourable to the appellant. It seems that the rest of the panel do not quite agree with this position of panel member one (line 39), but it is panel member three who gets to voice this in stating the "experience" of the solicitors concerned (lines 40 and 41). Panel member one, however, still continues to express concern, and seems to go through what will occur but with a sense of doubt as to the desirability of such an outcome (lines 42 to 44) - this is not too clear on the tape, though it is not possible to gauge whether it has been designed as unclear or it has been due to other reasons. This concern of panel member one is met by a statement from panel member two (lines 45 and 46) that if the appellant can get a good psychiatrist's report then the case of the appellant will have merit. This discussion between panel members one and two seems to be between a concern for the outcome of a psychiatrists report in giving the appellant access to the children (panel member one), and a concern for the nature of due legal process (panel member two).

This debate about the need for a psychiatrist's report, between the panel members is brought to a halt by the chair who makes a request to the clerk for the age of the boys concerned, stating that the information is not included in the information which the panel members have been provided with (lines 47 and 48). There then follows a recognition of the question by the clerk (line 49) which is added to by the chair that it is assumed that the panel does know this information (line 50), this is confirmed by the clerk (line 51) and the question

is restated by the chair (line 52). The clerk, reading from his documents, then gives the names and age of two boys and states that there is a third (lines 53 and 54), the panel members then state together this child's name (line 55). The clerk then states that child's name and age (line 56). The chair acknowledges this information (line 57) after which many of the panel member's talk at the same time and two of the girls names are mentioned (line 58). This seems to have been a request for the girls age or a reconfirmation of the lack of this information, this references back to the earlier request and response (or lack of it) (lines 8 to 11). This is met with a confirmation by the clerk that they do not have this information (line 59).

Following this the chair makes a statement (lines 60 and 62) that the appellant wants to make two claims for legal aid, this is actually the repeating of an earlier statement by the chair to the same effect (lines 12 to 17) which was not taken up for discussion by the panel at the time (line 18). It is the clerk who is addressed and confirms the statement this time (lines 61 and 63), compared to a panel member on the earlier occasion (line 18). However, again this not taken up for further discussion, but is followed by a request by panel member two as to when the appellant last saw one of the children (lines 64 and 65). This request is not fully finished as it collides with some unclear talk from the panel (line 66), but results in a suggestion by panel member one as to when this last occasion was (lines 67, 68 and 70). That, panel member one is working from the documents is displayed by the confirmation of this suggestion by panel member three, who states that the documents suggest that to be the case (line 69). This is followed by the chair stating that due to the distance between the two locations involved, where the child lives and where the appellant lives "what sort of contact" could he have had with the son named (lines 71 and 72), to which panel member two suggests that the panel could ask the appellant this question (line 73) to which the chair concurs (line 74).

Having put aside the issue of how often the appellant has had contact with the children, panel member three now introduces a new topic - that the appellant is now living in a probation hostel (line 75). However, this topic is

not taken up but rather, after a bit of unclear overlap (line 76), panel member one again raises the issue of the appellants mental health this time by noting that the appellant is having, or has had, treatment from a psychologist (line 77). Panel member one is not just noting the fact though, rather their concern is question to how permanent such treatment is and whether it is on-going (lines 77 to 79). To this the chair points out that the appellant has interfered with the girls, but has not touched the boys, and in that respect he is "quite normal" (lines 80 and 81), a fact said with some amusement by the chair. This is not met with any great response from the panel (line 82), and the chair continues to state which female child the appellant has "interfered" with (line 83). At this point panel member one states that they would like to know how old the two girls are, information which we have seen the clerk is unable to provide (line 84), as it would influence the amount of risk that panel member might feel the girls to be in if the appeal and court case were successful (lines 84 and 86). Panel member two, as earlier with the question of contact (line 73), suggests that this is an issue that can be directly asked of the appellant (line 87). Panel member two continues further to state that personally they do not have a lot of sympathy for the case (lines 87 and 88), to which panel member one states that they start from the same position (lines 89 and 90), but panel member two continues and states that the documentation before them does suggest further investigation (line 91).

After this statement of opinion there is a three second pause before the chair states their belief that if the case is successful it is going to use a lot of legal aid money (lines 92 and 93). This, I suggest, can be seen as reiterating the chairs earlier general comments about the cost of "hopeless" cases to the public purse (lines 19 to 21, 23, 24, 26 and 27). This meets an unclear response from the rest of the panel (line 94), but seemingly one of approval, and the chair carries on to state that it will also cause distress to the mothers and children (line 95 and 96). Panel member one adds to this that if the mother of the child is determined to stop the step-father, although this is corrected to father (lines 104 and 105), having access to the children there is nothing the court can do as

it is not going to order the children to be taken from the mother (97 to 101). Panel member three adds to this statement that if it were the case, then one could not blame the mother (lines 102 and 103), and the chair seems to add that the scenario is a horrible one. Panel member one continues by stating that since the boys who the appellant wants access to are living with the girls whom the appellant "interfered" with, the whole family will be upset (lines 107 and 109).

Panel member one seems about to continue (line 109) but panel member two interrupts to state that the panel takes these concerns into account (lines 110 and 111), but before the sentence is completed panel member three completes it for them by adding that they will be taking this into account when they hear what the appellant has to say (line 112) - two questions for the appellant have previously been suggested. To this panel member two again states that they believe that these worries of the panel are not enough to deny the merits of the case (line 113). It is just after this that panel member one formulates the problem as being that of "judging the case almost" (lines 115, 116 and 118), to which after a slight pause the chair states that to an extent they do have to do this (line 119), to which panel member three states the reason being that they are "rationing money" (line 121) to which the chair concurs (line 122). This issue of "rationing money" can be seen to be the panel attending to the fact that they are dealing with monies from the public purse and, although not technically limited, is an issue to be attended to as we can see the chair doing earlier in the case (lines 23 and 24). The clerk asks what seems to be whether the appellant should be brought in (line 123), the chair replies in the affirmative and thanks the clerk (line 124) and with virtually no transition period or 'informal' talk time the appellant enters the room and is welcomed by the chair (line 126).

Summary.

The phase begins with hesitation by the panel members, although it is not explicit here in the transcript, it is quite clear to the panel members what the initial hesitation is about, and what the nature of the additional information is to be about, because the panel can see from the documents in front of them that the appellant has a previous conviction for child abuse. That this is evident to them may be displayed in that the chair has not asked for, and no panel member has offered, a definite clear cut opinion on the case. Further documentary information is then requested from the clerk by panel member three (line 8 and 9). Then we see the attempted construction of the salient points of the case, the mutual or joint recognition of what the phenomenon is, this construction of the case is achieved from the documentation. It is the chair who is the person doing this (lines 12 to 17), and it may be possible to see this as one of the tasks of the chair, that the chair has perceived it to be so in this instance, although it does not necessarily have to be so. However, this line of discussion comes to a halt and there is move to 'other cases' which comes after a long pause (line 18). It appears that the lack of development of the original line of discussion instigates this. This broadening out of the discussion then facilitates a reorientation to the case, a refocusing through 'provoking' panel member two (line 32)

The chair would seem to go on to labelling the current case also as hopeless, and hence giving his opinion on the case, although it is a rather indirect assessment (lines 19 to 21). The chair does this by including the case with cases which it is claimed judges believe should not have legal aid due to their lack of likelihood of success (lines 26 and 27). The unlikelihood of success, a legitimate reason for its refusal of legal aid, is made without direct reference to directly stated aspects of the case itself. This assessment of the case by the chair is constructed with reference to criteria outside the direct content of the case itself, but in the context of other cases going through the courts, this assessment relies on personal experience. This displays the flexibility of the members practices in allowing this sort of material to be introduced and

possibly incorporated into their assessment.

The chair then states, apparently reading from the documentation, that the reason that the case was originally refused legal aid was due to lack of reasonable prospects of success and the welfare of the children (lines 34 to 36). This brings the discussion back from a broader discussion to the specifics of the case, and seems to be in response to the suggestion by panel member two that a psychiatrist's report is needed (lines 32 to 33). This also appears to address of the concerns of panel member one at the beginning of the case (lines 5 to 7), as to the welfare of the children.

However, again the discussion of the case moves away from an 'objective' consideration of the case (lines 37 and 38), with panel member one expressing an explicit concern that the appellant could be successful. This seems to be met with some concern by the other panel members (line 39). Panel member two attempts to allay panel member one's concerns by referring to the experience of the solicitors involved in the case (lines 40 and 41). Panel member one continues to express concern (lines 42 to 44), then panel member two gets the discussion back to the panels 'official' remit of assessing the case on its merits and not on their worries about the outcome (lines 45 and 46). Note that this is done via reference to the production of a document to be then assessed procedurally, at least that is the implication of the action of obtaining a psychiatric report.

Throughout the phase the tribunal members attend together to the documentation in front of them. This is especially evident when the whole panel state the third child's name (line 55) in response to the clerk's failure to do so (lines 53 and 54). This is also an illustration of documentation being used to provide information for the situated activity of constructing the appellant's 'situation' as regards to the appeal.

The comment as to asking the appellant a question (line 73) is a clear illustration of the panel members in phase one orientating to the future i.e. the work of discussing the case with the appellant. It can also be seen as the line-up of future activities, and the putting aside of unanswerable questions that could

lead to supposition if followed up in the present. And has been shown in the previous two cases (case two of chapter three and case one of this chapter), that this locating of something to ask the appellant may lead to the termination of the work of discussing the first phase of the case. However this does not happen here, and thus illustrating some of the flexibility of the practices used by the panel.

There appears to be a conflict between panel members one and two (lines 84 to 91), over concerns of the former as to the consequences of allowing access by the appellant to the children, and the latter as to the due legal process warranted by the application. It can be seen as the resurfacing of earlier concerns in the discussion of the case. Also, panel member two can be seen here to be giving an assessment of the merits of the case (line 91) and possibly suggesting it is worthy of legal aid. Here we can see a struggle between a overtly 'moral' or 'concerned' approach to the assessment of the case, one introducing an 'artifactual' (in the scientific sense) interpretation and one based on 'legal procedure'. What is noteworthy is that this 'artifactual' interpretation is not met with outright rejection by panel member one in their desire to assess the case on its legal merits. This conflict is 'settled' with panel member one (lines 97 to 101) saying that, even if the case was successful and the appellant got access through the courts to the boys, if the mother ignored the courts then the courts were virtually powerless to make their decision prevail. This being because they would not take the children from a mother who refused to let a father have access to a family whose one or more members he had interfered with. Notably this seems to be the panel member not using the legal rules rigidly but knowing the possible practical outcomes i.e. lawyers common-sense knowledge over legal statute.

Here we can see that the discussion of the case has moved away from the assessment of the case in terms of strictly legal criteria, but in terms of the outcome of the success of the case for which legal aid is being applied for. When panel member three suggests that they will be taking this into account when they hear what the appellant has to say (line 112), two questions for the

appellant have previously been suggested, this appears as an attempt to move the hearing on.

When the first phase of the case is brought to a close it is instigated not by the panel but by the clerk, but not until after a 'pregnant' pause (line 122). This indicates that the clerk has been following the discussion and has decided it has gone far enough to warrant a move to phase two - as we have seen certain issues have been noted by the panel for inclusion in the following phase.

Finally it is interesting that the chair believes that it is part of their job to ration the monies of the Legal Aid Board as this is not in fact the case, and no mention of rationing is made in the Legal Aid Handbook 1994. Rather, if the case warrants it, it receives legal aid irrespective of issues of how much money the Legal Aid Board's budget has.

Case Five¹⁸ - (Venue - See Appendix One Venue Number Two).

Due to the length of this cases, and that all of it has been transcribed here, the case is presented in three segments. The first segment contains phases one and two of the tribunal, the second contains phase three, and the third phase four.

- | | | |
|----|-----|--|
| 1 | pm1 | :what did you say (.) |
| 2 | ch | :I said I said would a fee paying client be advised to take action |
| 3 | | (.) no |
| 4 | all | :(laughter) |
| 5 | ch | :well a fee (.) you see a fee paying client who could afford this |
| 6 | | type of work could send their child to a private school and |
| 7 | | (unclear) (.) |
| 8 | ? | :(unclear) (.) |
| 9 | ch | :you would be going to (Sidford Mall?) or somewhere like that (.) |
| 10 | | err and you would have the provision (.) |
| 11 | cl | :that's not necessarily true though is it (.) I mean (.) |
| 12 | ? | :(laughter) |

¹⁸ Data session nine tape two case one.

13 cl :they could (.) they have a very modest income and eight grand in
 14 the bank and they wouldn't be eligible for legal aid (.)
 15 ch :quite right (.) I mean one has a (.) one forgets how how restricted
 16 the (.) legal aid is now (.) but on the other hand I believe these- cl
 17 : [umm oh yeah
 18 ch :-are very serious matters actually (0.2) erm my own (0.2) I made
 19 these reservations (.) to us here (.) my own reservations is that this
 20 is again (.) a very poorly presented (.) application a very poorly
 21 presented appeal I mean it is all very well to (.) err refer to the act
 22 but act actually doesn't help you (0.2) you need to go a whole lot
 23 further into it (.) I mean to point to section two six of the further
 24 education act (.) made it plain (0.2) well it doesn't make it plain
 25 at all actually but there we are (.) I mean (3.0)
 26 pm? :he cites this other this case (.) december 7th (.)
 27 ch :that's not a reported case (.) (unclear) reported in the times (.)
 28 times report (0.2) is is mister (solicitors name) (.)
 29 cl :yes yes mister (solicitor) and erm looks like mother and father
 30 (.)
 31 ch :right (0.2) okay (unclear)
 32 cl : [right (.)
 33 ? :bring them in (5.0) [foot steps walking away]
 34 ch :(anybody) got thee section two six err higher education act
 35 nineteen
 36 pm1 : [I'll rely on you (.)
 37 pm2 :oh and I do (name of chair) (.)
 38 ch :(oh) well I'm sorry about that (but depends what happens)
 39 (unclear) (.)
 40 pm3 :(well we started with Rutherford and Mill?) (unclear) (.)
 41 ?? :(laughter) (unclear) (10.0) [appellants and solicitor return and get
 42 seated]
 43 cl :mister and misses (wrong name) is it (.)
 44 s :(right name) (right name)
 45 ch : [right name
 46 m : [(unclear)
 47 cl : [I'm sorry (right name) and mister (solicitors
 48 name) (.) right mister and misses (name) you've applied for legal
 49 aid or rather (.) your son (name of son) has applied for legal aid
 50 and you (.) that is his (unclear) (.) legal aid is sought to (.) seek
 51 a judicial review of the decision made by (name) county council
 52 as to the further education of (son's name) (.) erm legal aid has
 53 been refused (.) erm it was felt on the information then available
 54 er (.) a successful result seemed unlikely (.) you appealed to the
 55 area committee against this decision (.) the area committee have
 56 some papers (.) err you and or mister (solicitor) will have a chance
 57 to address the committee and there will be some questions for you
 58 (0.2)

59 ch :err (.) mister and mrs (name) my name is (name) I'm
60 accompanied by mister (name) (name) and mister (name) (.) if I
61 may tell you what we have read so far in detail (.) we've a
62 statement which I think is by you misses (name) (.) dated thee err
63 (.) its I think the sixth of the ninth I think september last year (.)
64 err we've got a statement here which is undated (.) it starts off
65 "this case raise important complex issues of law" (0.2) errm we
66 have a letter from mister (solicitor) errm (.) asking for the matter
67 to be relisted (.) errm (.) er another letter saying that a (.) written
68 statement in relation to the appeal against the appeal for legal aid
69 (0.4) errm (0.2) another letter (.) err about mention a case
70 (unclear) dorset county council (0.2) and err another letter also on
71 that (1.0) errm (2.0) referring to thee (.) err fact that the board
72 had refused the application on the basis of no reasonable prospects
73 of success (.) which of course isn't quite right (0.2) its a refusal
74 (.) on the grounds of (unclear) that's part of it no reasonable
75 grounds for (taking?) (0.2) errm then we have that decision (1.4)
76 now (1.0) perhaps you could (.) (tie that on to?) your case you
77 could tie it up (unclear) perhaps you could take us through it (.)
78 s :err well perhaps a chronology would help (.) beginning with the
79 interests of er the child (.) who's now sixteen (.) (child's name)- ch
80 : [yeah
81 s :-born (date) er when he was very young he was assessed as being
82 a child with (.) special educational needs (.) and the local ~~education~~
83 authority this was (place name) count county council (.) went through the
84 statutory statement proc er processes under the education act (.) and the
85 statement was in force (.) until the child was (.) sixteen years of age (.)
86 there are also statutory
87 requirements which require that there be a transition plan for
88 children from the age of fourteen (.) taking them through to adult
89 (.) life (.)
90 ch :right can you point to that what whats the statutory reference for
91 that (.)
92 s :errm well I don't have the statutory references here but I do have
93 a (.) guide book (.) erm issued by the (.) department of education
94 (.) relating to special educational needs (.) and there is reference
95 in there (.)
96 ch :perhaps you would find that and read us the bit saying there is a
97 duty to (.) to provide the statement (5.0)
98 s :errmm well I'll read the relevant passage here (.) "education for
99 young people with special education needs does not stop at sixteen
100 (.) depending on the child's interests and abilities (.) he or she can
101 stay on at an ordinary or special school (.) or can move to a
102 college of further education (.) erh many schools have developed
103 link courses with colleges so that so that pupils in their last year
104 at the school (.) can go on to a college (.) on a part-time basis (.)

105 erm further education is available for young people over the age
106 of sixteen (.) if your child has a statement of special educational
107 needs (.) further education will be considered (.) when the
108 transition plan is drawn up when he or she is fourteen" (.) and
109 then there is reference there to an earlier section (.) on page thirty
110 one (.) I really didn't want to dwell on this point too long (.)
111 ch :so are you saying that no transition plan was drawn up (.)
112 s :well as far as I can ascertain no transition plan has been drawn up
113 and I have discussed this with mister and misses (name) (.) and ch
114 : [they would surely
115 know
116 s :-and the latest official document was the (.) latest form of the
117 statement (.) which (.) was dated the 14th of august ninety-two (.)
118 and I have a copy of that and that actually recommended that the
119 child remain (.) at the school where he then was which was the (.)
120 (name) special school in (place name) (.) and that always remained
121 (.) err the wish (.) of the parents (.) now its part of our case (.)
122 ch :er could you just pause a moment (.) was that's that's erm (.)
123 certificate given (.) for (.) thee (.) for (child's name) fourteenth
124 birthday (.)
125 m :that was the (.) that is the plan (.) that was the last statement (.)
126 he would get (.) to to provide
127 ch : [was it was it given before he was fourteen (3.0)
128 s :he was just he was gone fourteen (.)
129 ch :he was gone fourteen so that that that then (.) but I mean that
130 surely (.) erm as things stand covers him till sixteen doesn't it (.)
131 m :yeah (.)
132 ch :so (.) you're saying the transition plan from fourteen to eighteen
133 hasn't been drawn up (0.4)
134 s :that's right (.) but the main thrust of my argument is really based
135 upon (.) that judgement that was made in december (.) erm and
136 (0.2) the fact of the matter here (.) is that (name of child) was
137 destatemented (.) there was never a considered reason why the
138 statemnting process (.) should stop when he reached the age of
139 sixteen (.) the local education authority simply did that (.) they
140 shouldn't have done that (.)
141 ch :well hang on (.) they did it you say (.) how did they do it (.)
142 s :they purported to d well they did it by (.) virtue of the fact that
143 they no longer are continuing with the statement (.) there was
144 never any consultation process (.) leading to a reasoned decision
145 for the statement in (unclear)
146 m : [they did actually write to me to say that
147 they were going to err (.) cease his statement (.) as from (.) a date
148 in august (.) and then I wrote back asking them (.) that I
149 ch : [you
150 haven't got have you got the letter showing (.) that they are (.)

151 they in fact (.) cause what they are doing in fact surely is saying
 152 (.) that they no longer propose to continue with the arrangements
 153 special arrangements (.) set out in the err certificate which was
 154 given just after his fourteenth birthday (.)
 155 s :yes the thrust of there approach is that they're saying that (child)
 156 m : [yeas
 157 ch : [yeah
 158 but I understand that but have you got the letter there (.)
 159 m :I didn't bring it with me no (.)
 160 s :but there's there's a bundle of correspondence here (.) passing
 161 between (county name) (.) and the clients that I can produce (.)
 162 dealing with these issues (.) but the fact of the matter is that there
 163 was no consultation process (.) (child's name) was (.) told that he
 164 could not continue staying at the school that he was at (.) and he
 165 was told that the provision that would be made for him (.) would
 166 be (.) under the financing of the further further education funding
 167 council (.) and that he could go to the (name) college (.) and that
 168 remains the position at the moment (0.2) now (.) if we refer to the
 169 judgement (.) err in the case decided in december (.) it is clear I
 170 submit (.) that the local authority will be acting outside their
 171 powers (.) if they either frame their statement craftily (.) so as to
 172 (.) take it outside the scope of their continuing obligations as the
 173 local education authority (.) or if they simply stop statementing the
 174 child when he reaches sixteen (.) without making a reasoned
 175 decision as to whether that is the appropriate thing to do (.) as I
 176 say that is precisely what has happened in this case (0.6)
 177 ch :I'm not very sure I fffollow you mister (solicitor) (.)
 178 s :well (.)
 179 ch :hang on a minute (.) lets just take this step (0.6) what you're
 180 doing you you start you go off (.) (child's name) situation you go
 181 straight into the situation of this (.) child who was in Dorset (0.2)
 182 dorsetshire county council (0.6) your what you're saying really is
 183 this (.) looking down half way down the page of that report (.) his
 184 lordships view once the child was statemented (.) the duty to
 185 maintain the statement (.) under the under section seven two of the
 186 nineteen eighty one act (.) now section one eight one six five (a)
 187 of the nineteen sixty three act (.) continued after the child reached
 188 sixteen (0.2) now surely your
 189 s : [unless and until amended or ceased to be-
 190 ch : [yep
 191 maintained on a proper proposal
 192 ch : [yep I didn't read on because I was
 193 going to say (.) your best point surely (.) is that (.) the authority
 194 has done nothing (.) this point (.) save to refer (child's name) to
 195 the F.E.F.C. (0.2) is that right (.)
 196 s :the fact is that they are no longer maintaining the statement (1.0)

197 ch :yes but that that could be alright isn't it if they've reached that of
198 a result of proper proposal (.) now if you're saying you're saying-
199 s : (unclear)
200 ch :-they've not done that (.)
201 s :elsewhere in the judgement it totally clear crystal clear (.) that the
202 local authority cannot rely on the regime of the further education
203 funding council (.) to absolve themselves from their own
204 responsibilities that's clearly written into the judgement here (.)
205 ch :yes but I have to say this is a times report mister (solicitor's
206 name) (.) those two paragraphs don't actually lie easily side by
207 side do they (.) because they say here one six one eight six five (a)
208 (.) errm statutory duty continuing after the child has reached
209 sixteen "unless and until amended or ceased to be maintained (.)
210 on a proper proposal by the local education authority" (.) then he
211 goes on to say the report would have it (.) and its contradictory (.)
212 "made it plain that the FEPC's duty to sixteen to eighteen year
213 olds was secondary to that of local education authority where the
214 latter was responsible and maintained or should maintain a
215 statement"(.)
216 s : "for a pupil with (unclear) education (unclear)"
217 ch : [yeah [so what (.) surely your
218 best point is this (.) that the the local the education authority have
219 not got to grips with need (.) to (.) take and make a proper
220 proposal (.) for this for (child's name) (0.2) am I right (0.2)
221 s :well what I'm saying is that they are no longer maintaining a
222 statement (.) und that they are (.) unlawfully failing to maintain a
223 statement (0.2) that they've adopted a policy (.) that where
224 children have special educational needs and are statemented (.)
225 they will automatically cease to statement them at sixteen (.)
226 without considering whether it's appropriate (.) those are the facts
227 of the case (.)
228 ch :well you don't do you have any evidence of the policy (.) I mean-
229 s : [basically-
230 ch :-I'm just trying to
231 s :- I've I've I've great
232 ch : [I'm only trying to make it easier for you you
233 understand mister (name of solicitor) I'm trying to make it easier
234 for you (.) because surely what here you're seeking to (.) judicially
235 review (0.2) a decision of this authority or its failure to make a
236 decision (.) am I right (.)
237 s :well if we look at the history of the matter (.)
238 ch :no sorry hang on (.) just a moment lets lets just I'm not cross-
239 examining you but are you am I right there you are seeking to
240 review (.) the failure to (.) do something (.) in this case (.) and-
241 s : [yes [yes
242 ch :-what they-failed to do (.) is to make a proposal (0.2) or to

243 continue with a proposal (.)
 244 s :they failed to maintain a statement (0.2)
 245 ch :well I'm I'm worrying about that (.) I'm worrying about the
 246 failure to maintain a statement but maybe I'm being too particular
 247 (.) I mean I've seen I've (.) read (.) the statutory references (.)
 248 and I I take the point that thee erh (.) further and higher education
 249 act does require them to (.) secure provision for sixteen to eighteen
 250 year olds (.) yuh (.) yes okay (.) right I I've been talking too much
 251 s : [umm
 252 ch :(.) (unclear) (.)
 253 pm? :yes I wonder how (.) how do you (.) do we define a proper
 254 proposal (.) what constitutes a proper proposal (.)
 255 s :well (.) if if a child with special needs has had those needs met
 256 for some reason as a result of the way he has developed (.) err it
 257 turns out (.) that there's no longer any particular need for him to
 258 remain under the regime (.) of the local education authority
 259 because his needs have been met (.) he's developed in such a way
 260 that that regime is not necessary that would be a proper proposal
 261 (.) that that somebody would propose that certain things are no
 262 longer necessary (.)
 263 pm :ah yes but how does this proper proposal manifest itself (.)
 264 s :well the obligation to maintain the statement (.) persists (.) until
 265 there is a proposal (.) that it shouldn't (.) if
 266 pm : [who makes this
 267 proposal (.)
 268 s :the local education authority (.)
 269 pm :how do they err (2.0) how does this this published (unclear) what
 270 do they do do they have a meeting and they all draw up proposals
 271 that this child should no longer be statemented and that the end of
 272 it (.) or do they have to enter into a proper procedure (.)
 273 s :no its its an ongoing process (.) und err (.) the local authority the
 274 education authority (.) the county council has the statutory
 275 obligation (.) to arrange for the statementing in the first place if
 276 the child with special educational needs is identified (.) now the
 277 way that it carries out its obligations (.) is (.) to (.) err usually err
 278 (.) contact the school where the child is if it is at a school (.) and
 279 arrange with the school (.) for preparation of reports on the child's
 280 progress (.) and also various other agencies are called in (.) err
 281 health officials (.) speech is considered (.) so it it's a multi-
 282 disciplinary (.) err matter (.)
 283 pm :you say this hasn't been done (.)
 284 s :I'm not saying it hasn't been done it was clearly done until the
 285 child was of a certain age (.)
 286 ch :six hundred and sixty seven of the nineteen ninety three act
 287 (seems to say its the provision of the state?) (.)
 288 s :it's it's the ceasing to provide statement (.) that we're tackling

289 here (.) and what we are saying is that there's a a policy (.) that
 290 in all cases of children with special educational needs (.) they will
 291 cease to cease to statement them (.) those individuals without
 292 considering whether that is appropriate or
 293 pm : [what is your evidence
 294 what is your evidence for that (.)
 295 s :well my evidence for that (.) is misses (child's mother name)'s
 296 case (.) discussions that I had with misses (name) of the education
 297 authority (.) erm discussions by telephone with the local education
 298 authority (.) when they cease err they seek to deny that there is a
 299 particular policy but where (.) the evidence is that there manifestly
 300 is such a policy (.) over a period of several years in (name of
 301 county) children children approaching the age of sixteen who have
 302 (.) for example (.) er remained at special schools (.) erm w i l l
 303 cease to be statemented (.) no specific official provision is made (.)
 304 children (.) have in the past been placed with the (name of college)
 305 which does not have the appropriate facilities (.) the college has
 306 found that it could not cater and then on an unofficial unfunded
 307 basis (.) the children have tended (.) in certain cases to be referred
 308 back to the school that they were attending for example at the
 309 (name of school) this has happened in the past (.) now in the last (.)
 310 year to two years (.) the local education authority have actually
 311 specified (.) that they're not going to continue doing that on this
 312 unofficial basis (.) in practice that will (.) what was happening to
 313 the children of ages between sixteen to nineteen (.) und er (.)
 314 statements were not being maintained for those children (0.6) now
 315 this practice (.) is widespread (.) it is a policy we say in (county
 316 name) (.) clearly the evidence is that other education authorities (.)
 317 err do the same sort of thing and there is the evidence of the err (.)
 318 dorset county council case (.) I don't know what the picture is
 319 nationally (0.2) but we're talking about (.) a small number of
 320 children who have very significant needs (.) the judgement here (.)
 321 if read carefully (.) and I know it it is not a full judgement but the
 322 substance (.) of the judgement is there and it it is an important
 323 judgement (.) is (.) that thee (.) regime of the further education
 324 council is not adequate (.) that the statutory regime under the
 325 education acts (.) for children with special needs (.) err is an
 326 important right (.) they must not loose that right (1.2) the reason
 327 that I have referred to this case is that I consider that it is (.) really
 328 on all (fours?) with my clients case (.) originally when we lodged
 329 our application for legal aid it was more broadly based (.) and err
 330 it was my contention (.) that what the education authority was doing
 331 was discriminating against a particular section of the children (.)
 332 namely children with special educational needs (.) but I don't need
 333 to continue with that (.) broad point because (.) we have this case
 334 here (.) and I think that really supports us very strongly

335 indeed (.) I really cannot distinguish (.) (child's name)'s case with
 336 the dorset case (0.4)
 337 ch :can I ask mister and misses (child's parents name) I mean (.) what
 338 has happened so far as (.) (child's name)'s education is concerned
 339 at the moment (.)
 340 m :he's at (name) college errm (unclear) but (.) he's there (.) he was
 341 very borderline as to whether or not they could take him or not (.)
 342 and he's he does have (.) very difficult problems (unclear) with
 343 behaviour so if therefore they decided to (.) errm (.) to (dis...?)
 344 (child's name) from college (.) which they are perfectly entitled to
 345 they don't have to keep him there (.)
 346 pm? :but at the moment he is there (.)
 347 m :he is there (.) I mean it is errm (.) I do have a letter here that (.)
 348 came (.) back from college which does sort tend to indicate (.) the
 349 problems that they're having with him (.)
 350 pm? :I mean your original statement you say that it it you have got
 351 a unit within the north (county) college (.)
 352 m :yes he's in a special unit (.) but errm they tend to build on more
 353 mild cases (of erm) (.) mental handicap than rather than the severe
 354 case that my son's got (.) my big problem that I worry about if if
 355 he (.) is excluded from college because of his behaviour (.) and
 356 they've got to (.) erm the education department don't make a new
 357 statement (.) they won't restate him (.) so he will not there
 358 will be no where for him to go there'll be no education for him (.)
 359 whereas if he continues to be statemented even if they say (.) that
 360 at the moment that he should stay at the college (0.2) if the college
 361 don't want him then then it's (.) the education department (.) s
 362 responsibility to find him somewhere else (0.2) whereas at the
 363 moment he is not statemented that's only (unclear) (.) so don't
 364 have anything to fall back on (.)
 365 pm? :so there's no problem at the moment but your concern is what
 366 would (.) what might (.)
 367 m :I'm not happy with him at the college I didn't want him to go to
 368 the college and I pleaded with them to stop at school but I didn't
 369 (unclear) (.) I mean (.) my son has ran out into the road the other
 370 day (.) he could have been run over and killed and I wouldn't have
 371 a son (.) that's never happened while he was at school (.) I don't
 372 know but they really are (.) qualified enough to be looking after
 373 him (.) und
 374 pm? : [and how far is the north (county name) college from where
 375 you live (0.2)
 376 m :mmm (.) two miles (.)
 377 pm? :so it's within easy reach (.)
 378 m :it within the town (0.2) I mean it's just a hundred yards from the
 379 school that he was attending (.)
 380 pm? :right umgh (8.0)

381 ch :any more questions (4.0) (name of school) school does provide
 382 for boys between sixteen and eighteen (0.2)
 383 m :no (.)
 384 ch :it doesn't (.)
 385 m :no (.)
 386 ch :so where're where (.)
 387 m :(county) county council have no schools in their (.) in the county
 388 at all that provides education for sixteen to nineteen (.) they don't
 389 have schools for (.)
 390 ch :there's no schools for (.)
 391 m :no (0.2)
 392 ch :fine (.)
 393 m :there's no designated schools for
 394 ch : [you're absolutely sure about that (.)
 395 m :yes (.) (unclear)
 396 ch :they make no provision at all (.)
 397 m :only only with the colleges
 398 s : [there is a there is a provision if I could just make this point (.)
 399 that erm there are (.) two basic categories of children with special
 400 educational needs (.) those that are statemented and those that are
 401 not statemented (.) non-statemented er (.) children with special
 402 needs may simply be slow learners and can be dealt with on a
 403 remedial basis in main stream schools and they will usually go on
 404 to (.) sixteen to eighteen in normal schools (.) so it is not quite
 405 accurate to say that normal (.) er main stream schools do not make
 406 provision for children with special educational needs (.) but
 407 statemented children (.) tend to have needs (.) that main stream
 408 schools are (.) incapable of coping with (.) with because they don't
 409 have the physical facilities or the staff to cope (0.2)
 410 ch :and the money (.)
 411 s :and the money (.) and what has happened in the past is (.) that
 412 schools such as the (name of school) special schools (.) have (.)
 413 plugged the gap filled in the gap for those sixteen to nineteen (.)
 414 er in the past (.) but now (.) as the result of the local education
 415 authority saying no they're not plugging that gap any longer (.)
 416 and there is a a lacuna here (1.0)
 417 ch :right [hushed voice] (0.6) I may read (.) in (.) this is merely your
 418 saying here have (.) section two of the (.) erm further and higher
 419 education act nineteen ninety two (.) "it shall be the duty of each
 420 council" (.) that the the education authority (.) "to secure the
 421 provision for the population of their area of sufficient facilities for
 422 education to which the subsection applies (.) that is full-time
 423 education (.) suitable to the requirement of the persons over
 424 compulsory school age who have not (.) attained the age of
 425 nineteen years" (.) so really you're you are saying that (county
 426 name) are failing (.) to fulfil that duty in respect of (child's name)

427 (0.2)

428 s :I'm saying that but that's a broadly based proposition that could-

429 c : [no no

430 s :-apply to other children as well (.)

431 c :oh I mean hah

432 s : [my my case is

433 c : [mister (solicitor's name) we got to you

434 mustn't (0.4) may I remind you you're seeking legal aid for

435 (child's name) (.) now it really is (child's name)'s needs and

436 (child's name)'s concern we're dealing with today and not (.) the

437 general picture of education in (county name) (.) I mean it's (.)

438 they have not (.) I mean (0.4) mister and misses (name) you have

439 told us they have not provided you with full-time education (0.2)

440 m :(unclear) (0.4)

441 c :although he is at this this college (0.2)

442 m :errm (.) although he did (.) but then (.) (county name)

443 (education?) himself (.) and they (.) on his statement it doesn't say

444 anything about (.) him going to the college (.) after he was sixteen

445 (.) so if (.)

446 c :your concerned that they could whip him out any time (.)

447 m :if the college declined to keep him then he's got nothing (.)

448 c :because that place is funded by the HEPC (0.2) right okay (.) I

449 I I think I've got that (4.0) have you anything else to add at all (.)

450 s :well (.) only one point which is that this is a public law matter in

451 the sense that we are dealing with statutory obligations and

452 although (.) (child's name) was an interested party (.) there is (.)

453 the point that if we are challenging what we say is there policy that

454 does have a knock on effect for other children (.) but of course if

455 we are seeking judicial review we're saying (.) that they are failing

456 in their specific duties towards (child's name) because he's-

457 c : [mmmh

458 s (unclear) entitled to that provision (.) and so that it maybe not-

459 c : [mmm [yeah

460 s : simply a declaratory (.) application (.) but an application for

461 (mandamus?) directed to make special (.)

462 c : [mmmm yeah no doubt about

463 that no doubt about that (.) that all (.)

464 s :errmm (0.6) I come back to this that what we really seek is for

465 implementation (.) of the regulations that pertain to children with

466 special needs that are stated (.) and not err directed to

467 (child's name) as a general member of the population (.) which

468 would apply whether he was a child with special needs or not (.)

469 c :yes I can see that that's an added factor here (.) okay (.) anything

470 else (0.2)

471 s :errm is there anything else that we've (0.8) it's a matter of

472 judgement on this point but (.) our (.) original application was ruled

473 out on the basis (0.2) that we didn't have a case (0.2) I (.) think that
 474 one (.) has got to take (.) a view of the way that proceedings can
 475 be dealt with in this sort of tribunal which is an appeal tribunal
 476 (.) this isn't a review of a judicial review application (0.2) and I
 477 have not prepared it on the basis that we're going before the court
 478 on a (.) a full hearing (.) this is a hearing to establish whether we
 479 should have legal aid (.) there may be (.) deficiencies in my
 480 arguments today through lack of preparation because (.) of
 481 the nature of today's proceedings is with regard to whether
 482 we should get legal aid (.) I would say that on the basis of what
 483 we have put before the tribunal today (.) I think that we've
 484 established that we've got something substantial to argue about (.)
 485 and I think at the very least (.) it merits a decision (.) to obtain
 486 counsel's opinion (.) at the very least (0.2)
 487 c :okay (.) fine (.) thankyou (3.0) if you would like to wait outside
 488 (23.0)

The transcript starts with panel member one asking the chair what their comments from their reading of the case documentation prior to the tribunal hearing were (line 1). The chair responds by stating that they had raised the question as to whether a fee paying client would be advised to embark on the legal action for which legal aid has been applied for, and states that their opinion was that they would not (lines 2 and 3). This being a legitimate reason for refusing legal aid and as such is a reference to the regulations guiding the panel. This is responded to with laughter by the other panel members (line 4), and although it is not evident in the transcript the general tone of the language of the first four lines has been one of underlying mirth.

The chair goes on to explicate their reasoning behind their opinion, stating that a fee paying client who could embark upon such an expensive course of action would, in fact, avoid the problem by sending their child to a private school (lines 5 to 7). There is an unclear comment (line 8), before the chair goes on to elaborate further by naming an example of such a school which provides such facilities (lines 9 and 10). However, at this point the clerk challenges the chair's assessment of likely courses of action by stating that someone on a modest income with a moderate amount of money in the bank would not be eligible for legal aid (lines 11, 13 and 14). It is notable that the

clerk has interjected on the deliberation of the panel, and that this contradiction of the chair is taken with good humour by the panel and with some laughter (line 12). The clerk is saying that someone ineligible for legal aid for financial reasons would not necessarily have the money to send their child to a private school due to the eligibility levels for legal aid. Now this contradicts the latter part of the chair's statement (line 5, 6, 7, 9 and 10), but not the earlier part which is whether a fee paying client would be advised to embark upon such a course of action (lines 2 and 3). Rather it contradicts the reason given for such a decision.

The chair then responds to this by agreeing with the clerk's assessment and comments upon how eligibility for legal aid has dropped to such an extent that individuals of moderate means are not eligible any more for legal aid (line 15 and 16). The chair at this point takes action to lower the levity which has so far accompanied the case. The chair states that these are serious matters, a comment that evokes agreement from the clerk (line 17), and goes on to comment further on the case (lines 16, 18 and onwards). The chair goes on to state that the case has been poorly presented (as he believes were earlier cases in the session), specifying the inadequacy of a reference in the documentation to a specific act of parliament on education. That reference to section two six does not clarify matters at all, although the chair seems to get a bit muddled in saying this (lines 18 to 25).

Following this one of the other panel members, it is unclear which, notes that the solicitor has cited a case (line 26), the date of which is then given (line 26). However, the chair goes some way to dismissing the status of this case by stating that it is not a 'reported case', but the report of a case in The Times newspaper (lines 27 and 28). The chair appears to be stating that the newspaper report does not have sufficient status to qualify the reported case as being able to be used as having set a precedent. The chair follows this statement with a topic change by asking if the solicitor for the appellant will be present (line 28). This is responded to by the clerk who affirms the question and adds the information of the presence of the two parents (lines 29 and 30). The clerk

has obtained this information not from the documents, but from checking the arrival of appellant as the tribunal session is in progress. Neither the question by the chair, or the answer from the chair, appear in the transcript as fully formed, but this is not problematic for the members themselves. The clerk's answer is acknowledged as having satisfied the request by the chair (line 31), thus confirming the clerk understanding of the question initially.

The chair gives a slightly drawn out "okay" and appears to make a request of the clerk which is unclear on the tape (line 31). This seems to be a request for the clerk to bring in the appellants, at least it is attended to as such by the clerk. The clerk responds with a repeat of the chair's "right", and seems to take this as concluding the first phase of the tribunal (line 32). One of the tribunal members then says to "bring them in", and the clerk leaves to bring in the appellants and their legal representative (line 33). The panel then orientates to the next phase, discussing the case with the appellant (and their representative).

In the transition period between the clerk leaving and his return with the attenders, the chair asks the other panel members if any of them have the relevant section of the education act for this case (line 34 and 35). Panel member one responds by saying that they, panel member one, will rely on the chair (line 36). Panel member two then does the same (line 37). The chair then responds to this by saying that he is "sorry about that" (line 38), and seems to mean that he is sorry they have not managed to be able to get round to reading the relevant Act. This is not an item which would have been included in the documents supplied by the legal aid board, but would have to have been done independently by the panel members. The chair seems to indicate that it might not be consequential (lines 38 and 39). Panel member three responds to this by stating, somewhat unclearly, that they started the hearing with some other case (line 40). This seems to be offered as some sort of reason or excuse for not having read the relevant act and evokes laughter from the other members (lines 41 and 42). Following this there is a long pause with the sound of returning

footsteps as the clerk and the attenders return.

Once the appellant and their solicitor are seated the clerk then checks that he has the name of the appellants correct (line 43), as it happens he does not use the correct name and is then corrected by their solicitor (line 44), the chair (line 45), and also unclearly by the mother (line 46).

Once the clerk has apologised for his mistake (lines 47 and 48), the clerk goes on to give a summary of their application for legal aid so far (lines 48 to 58). This is similar to the second case (case two) in Chapter Three. The first thing that we note of difference here is that the appeal is being brought on behalf of their son, and not on behalf of themselves (lines 48 to 50); this is allowable when the appellant is a child. The clerk then states what legal aid has been sought for, a judicial review of a decision of a local education authority (lines 50 to 52). Following this the clerk notes that legal aid was refused and that this was due to success being deemed unlikely, although specific reference is given here to "information then available" (line 53). Referencing that appellants are allowed to introduce new information and evidence during the tribunal hearing, new information that could lead to a decision differing from the initial assessment both in phase one and the original assessment. The clerk then notes that the appellants have appealed against this decision to the area committee, i.e. legal aid tribunal (lines 52 to 55). Then he notes specific documents centrality to the work of the tribunal that the committee has (line 55 and 56). Finally, the clerk states that the appellants and/or their solicitor will have a chance to address the committee and the committee will do likewise to them (lines 56 to 58).¹⁹

Following this the chair then addresses the appellants, the parents rather than the solicitor, introducing himself and the three other panel members by

¹⁹ Of note here is Pomerantz's observation of a similar event that: "This is the first occasion in which the 'basic facts' of the case are described: what happened, when it happened, who is named as defendant, and the extent of the alleged damage. In describing them, the adjudicator introduces them into the record and gives both plaintiff and defendant access to a version of the facts that the court provisionally accepts" (Pomerantz 1987:229).

name (lines 59 and 60). The chair then goes on to detail the documents that the panel have read (line 60 onwards). The chair refers to one of these by its author and date (lines 61 to 63), a second by reading the first line (lines 64 and 65), a third by stating who it is from and what action it was intended to perform (lines 65 to 62), a fourth letter which the chair seems to be going to quote from but then only states its main theme (lines 67 and 68), a fifth letter about a case concerning Dorset County Council (lines 69 and 70) and a sixth letter concerning the refusal of legal aid (lines 70 to 73). The chair states that that this letter is incorrect in its statement of the reasons why legal aid was refused. This seems to be a letter from the solicitor and the chair states why it is only partially correct (line 63 to 75), although the exact reason is not clear on the tape. The chair then lists a final document which is the one containing the decision of the legal aid board to refuse the case initially (line 75). The chair having finished listing the documents then suggests that the appellant/solicitor could tie these documents together by taking the panel through the case (lines 76 to 77). What is not clear here is whether this final statement/request has been directed at the appellants or their representative. This is one of the potential limitations of purely audio data.

Whether or not the question has been asked of the appellants or their solicitor it is the solicitor who speaks (line 78), and this is not in over-lap with the appellants or 'challenged' by them or the panel. When the solicitor begins he does so by suggesting a format by which the case can be related to the panel i.e. a chronology of events (line 78). The solicitor also informs the panel that the focus will be on the interests of the child - or at least "beginning with" (lines 78 and 79). This flagging of "beginning with" may be seen as an early notification that there is more to the case than just the interests of the child. The chronology of the child's problems starts with a statement of the child's current age, sixteen (line 79), thus indicating the length in years of the chronology, before working through the events relating to the problem in a chronological order beginning with the child's date of birth (lines 79 and 81). The solicitor

then states that "when he was very young" he was diagnosed as having special educational needs by his local education authority, which is named, in compliance with the education act (lines 81 to 85). The solicitor does not deem it necessary to give the date of this assessment, nor is it requested, thus indicating that such a fact may not be important in terms of its exact temporal location in the chronology, just that it occurred. The solicitor then goes on to note that the statement was in force until the child was sixteen (lines 85 and 86). There is a shift here from a chronology of the child's life events in relation to its educational needs, to a rendering of the history of the application of relevant legal requirements to him. This move is subtle and becomes clear as the solicitor then goes on to note the legal requirements for a 'transitionary plan', for all children covering them from fourteen to adult life (lines 86 to 89). The shift is attended to unproblematically by the chair who asks the solicitor if they could provide the statutory references for the legal requirements for the transition plan (lines 90 and 91).

The fact that the solicitor can not provide the statutory references (line 92), does not seem overly problematic to the chair and the panel. The solicitor instead offers a guide book containing a relevant reference from the Department of Education (lines 92 to 95). The chair then asks the solicitor if they would read to the panel the relevant information on the duty of the local education authority to provide a statement (lines 96 and 97).

It takes a short time for the solicitor to locate the relevant passage of the guide book, but when this is achieved the solicitor overtly informs the panel that he is going to read the relevant passage (line 98). This is interesting in that the chair has asked for a quote in the first place, but also because members can 'usually' hear a quote as a quote due to the intonation of the reading. So the prefix may or may not be doing the work of something else apart from introducing the quote, possibly regaining some control of the direction of the interaction. Certainly, after reading the quote²⁰ stating that a transition plan

²⁰ The quote seems to be able to be heard to end here due to both the nature of the talk that follows and the intonation change.

should be drawn up at the age of fourteen for a statemented child (lines 98 to 108), the solicitor retains the speaking turn. The solicitor draws attention to a reference made in the text to an earlier section of the text quoted, a page number is actually given, but the solicitor does not choose to go back and read it (lines 108 to 110). Rather the solicitor states that they "didn't want to dwell on this point too long" (line 110).

However, the solicitor does not get far in controlling the direction of the tribunal in this instance as the chair tries to surmise what it is the solicitor is trying to get at. The chair asks if the solicitor is saying that no transition plan was drawn up for the child (line 111). The solicitor responds to the chair by saying that as far as he can "ascertain" that that is the case (line 112). The solicitor then goes on to invoke his discussions with the parents of the child to back this statement up (line 113), but before he can finish the chair interrupts the solicitor stating that the parents would surely know (lines 114 and 115). The solicitor though, does not stop to answer this assertion/question but carries on with his reply to the previous question focusing on the latest statement of the child, and he gives the date of this document (line 117), and that he also has a copy off the document with him (line 118). The reference to the date (line 117) appears to be invoked as a validity criterion of the document. The solicitor asserts that this statement recommended that the child remain at the school where he was when the statement was made, noting the school name and location (lines 118 to 120). He then carries on to say that that was also the wish of the parents (120 and 121), and is in the process of outlining how this fits into the case (line 121).

At this point the chair asks the solicitor to "pause" a moment (line 122), and then asks if that "certificate" is the one drawn up on the child's fourteenth birthday (line 122 to 124). It is the mother that responds to this not the solicitor, this might be due to the chair having stated previously (lines 114 and 115) that the parents would know, possibly being interpreted as indicating that the parents could give some input and not rely only on their representative as in more 'formal' legal procedures. The mother starts to talk of the "plan" and

then corrects this to statement,²¹ that the child gets (lines 125 and 126), but is cut short by the chair who asks if he was given this before he was fourteen (line 127). It is the solicitor, however, who responds to this question saying that the child had just gone fourteen (line 128).

The chair continues after the solicitor by stating as a question, that this meant that the child was covered until he was sixteen (lines 129 and 130). To this the mother replies with a simple affirmative (line 131). After this the chair again tries to summarise what it is the appellant and their solicitor are trying to say, that a transition plan document has not been drawn up for the child (lines 132 and 133). This is the same question that was put at the beginning of this segment of talk (line 111), except that the second formulation has an age group category attached (lines 132 and 133).

The solicitor agrees (line 134) with the chair's statement that what the appellant and their solicitor are doing is saying that a transition plan for the child has not been drawn up. But goes on to state that his (line 134), the solicitors (notably not the clients) case is that the child was destatemented by the local education authority at the age of sixteen and that they should not have done so (lines 134 to 140). At this point though the chair again halts the solicitor to ask how the local education authority apparently achieved this, wanting to know what constitutes destatementing in this particular instance (line 141). In reply to this, after making a false start (line 142), the solicitor states that it was achieved by not continuing with statementing, and no consultation "leading to a reasoned decision" (lines 142 to 145) - legally consultation with the parents should take place. The solicitor is set to continue but is interrupted

²¹ A statement is "a legal document which states the child's special needs and which binds the [local education] authority to providing for these needs" (McCracken and Sutherland 1991). This is required under the 1981 Education Act for all children assessed as having learning difficulties. Mehan (1983) has looked at language and role in the American procedure for the assessment of children for special education programmes. He notes the significance of the use of written documents in the production of authoritative accounts by professionals, it is likely that the parents here are not therefore unfamiliar with text based assessment procedures such as this tribunal.

by the mother who states that they were informed about the destatementing and the date at which this was to commence (lines 146 to 148), it is notable that the mother has 'stayed' in the discussion after being brought in by the chair. The mother is about to embark upon a description of a letter that she wrote to the local education authority (line 148), but is interrupted by the chair asking if she has a copy of it (lines 149 and 150). This request for the document can be seen as a request for proof in the form of textual evidence, however the request is not attended to. The chair continues by describing what he expects the letter to contain with reference to the last statement (lines 150 to 154). The chair seems to position an argument that is counter to that of the solicitor.

The solicitor does not reply as to whether they have a copy of the letter and he again attempts to talk 'beyond' the question (see line 110 above), this time by attempting to agree with the chair's description of the contents of the letter and to add more (line 155). This is at the same time as the mother starts to speak (line 156) but the solicitor talks over the start of the mothers talk (lines 155 and 157). However, the chair interrupts the solicitor to return to whether or not the mother has the letter with them (lines 154 and 158).

When the mother answers the chair that she does not have the letter (line 159), although she does not attempt to add any further information to the response or try and develop the discussion in a more positive direction, her solicitor does. In response to his clients admission of lack of documentation the solicitor immediately responds, taking charge for the reply, that "there's bundles of correspondence here" dealing with the same issue (lines 160 to 162). The solicitor suggests that proof of its existence can be made with reference to correspondence that is available referencing the document. It is notable that the solicitor tries to substitute another set of documents as equivalent for the one that is missing. The solicitor then attempts another topic change by suggesting that "the fact of the matter" (line 162) is that there was no consultation process, and enters into - returns to the original strategy of giving - a brief chronological list of events to the present situation (lines 162 to 168). After this the solicitor then moves the topic to a similar case - this is the case discussed by the panel

before the solicitor and appellants entered (lines 26 to 28) - where the judgement was that an education authority would be acting outside its powers if it stopped statementing a child without reasoned decision making (lines 168 to 175). The solicitor then concludes that this is what has happened in this case (lines 175 and 176).

Although the solicitor has finally manage to present what he believes to be the case of the appellant, he has not managed to convince the chair who declares that he does not follow what the solicitor is attempting to explain (line 177). The solicitor attempts to explain (line 178), but is halted by the chair (line 179). The chair then goes on to attempt to clarify what the solicitor has been saying. The chair does this by stating that the solicitor is attempting to equate the child in the current case with the case of the child of the case in Dorset - this is a reference to the newspaper article (line 179 to 182). The chair then summarises some of the report of this case and quotes references to acts of Parliament, invoking written texts, in an attempt to get at what the solicitor is saying (lines 182 to 188). The chair is about to make a suggestion (line 188), but is interrupted by the solicitor who carries on with the quote the chair has been reading to include a part which the solicitor believes supports his point (lines 189 and 191). This seems to be a verbatim quote from the earlier text read out by the solicitor, but may be from one of the acts, either way it is not prefaced with an introduction but just stated and seems to be taken in an unproblematic fashion by the tribunal members.

The chair, sensitive to this comment by the solicitor, explains their reason omitting the last part of the quoted text stating that it was because they were going to make a suggestion as to how the case could proceed, and asks the solicitor if they are right (lines 192 to 195). It does seem as if the chair has managed to state what they were going to say at the end of their previous turn. The solicitor does not go along with the chair but rather reiterates the earlier argued 'fact' of the authority's failure to maintain a statement (line 196). The chair responds to this by saying that this may not be problematic if they have done this as a result of a proper proposal (line 197 and 198), and 'asks' if that

is what they are saying is, that they have not done that (lines 198 and 200). However, the solicitor does not respond directly to this question, but rather returns to the report of the judgement on the Dorset case and to its clarity on that point (lines 201 to 204). The solicitor invokes the text to substantiate the claim here.

The chair responds to this by addressing the solicitor by name and stating that the letter is only a newspaper report (lines 205 and 206), and then notes that the report is problematic (lines 206 to 211), is contradictory (line 211), and goes on to quote a second part of the report (lines 211 to 215). Seemingly calling this evidence, and any argument based on it into doubt. Here again the solicitor carries on where the chair left off the quote (line 216), the reason being that the further extract supports their argument. This mutual attendance to separate copies of the same text is on obvious display here with one member able to follow the other seamlessly.

Whilst the chair acknowledges the solicitor's continuation of the quote (line 217), he then goes on to reformulate his, the chair's, earlier statement of what the problem is, that a proper proposal has not been made for the child (lines 217 to 220). It is notable that the chair again asks the solicitor whether he is right or not (line 220). However, the solicitor does not offer agreement with the chair but rather reformulates what their position is, that the local education authority is not maintaining a statement of the child (lines 221 to 223). But the solicitor goes on, widening their position, to further state that the local education authority have adopted a policy of doing this to children of special educational needs (lines 223 to 226). The solicitor attempts to support this statement, and possibly close the discussion down to the point, by stating that "those are the facts of the case" (lines 226 and 227).

The chair, however, challenges these "facts" by noting that the solicitor has no evidence of such a policy, and attempts to continue (lines 228 and 230), but is interrupted by the solicitor (lines 229 and 231). Nevertheless the chair manages to continue and states that they are only trying to help the solicitor, and states what it is he believes the solicitor is attempting to do (lines 232 to

236), and asks the solicitor if he is right (line 236). The solicitor does not answer this question but makes an attempt to restate the position he is taking towards the case (line 237), but the chair stops him, explains that he is not "cross-examining" him and asks again whether or not the solicitor is after a judicial review because the local education authority has failed to maintain a proposal (lines 238 to 240, 242 and 243). The solicitor agrees with the chair that they want a review because of a failure to do something in this case (line 241), but states that it is a failure to maintain a statement (line 244). The chair believes it is a failure to maintain a proposal and much of the disagreement can be seen to emanate from these two positions.

The chair states that it is this difference over what the local education authority has failed to do that is worrying him, but cedes that he may be "being too particular" (lines 245 and 246). The chair goes on to state that he has read the relevant statutory references, and hence agrees with part of what the solicitor is saying (lines 247 to 250) - seemingly to qualify his position. This receives an acknowledgement token from the solicitor (line 251), the chair then continues by winding-up their talk by saying that they have been talking too much, hence opening the floor to the other panel members (lines 250 and 252).

The panel member who takes up the talk after the chair asks the solicitor if they could give a definition of a proposal and how it is constituted (lines 253 and 254). This can be seen as keeping with the topic that the chairman was discussing, in that rather than talk about statements the panel member wants to clarify proposals. The way that the solicitor responds to this is by stating what would constitute grounds for a child with special needs to be given a proposal, that they had successfully developed beyond special needs, but this itself would need to be proposed (lines 255 to 262). The panel member then repeats the second part of their question by asking how such a proposal "manifests" itself (line 263). The solicitor replies that a statement has to be maintained until a proposal is made stating it should not be maintained (lines 264 and 265). The panel member, overlapping and interrupting, asks whom makes such a proposal (lines 266 and 267), and is told by the solicitor that it is the local education

authority (line 268). The panel member then asks if this is done by the local education authority at meeting or by a "proper procedure" (line 269 to 272). The solicitor, replying to the question describes the process of statementing rather than proposal construction (lines 273 to 282). To which the panel member inquires if the solicitor is saying that this has not been done (line 283). The talk has gone from talk of the proposal to talk of the statement, what the solicitor has been attempting to do all along. Previously the chair was not moving from his focus on the proposal but the panel member has proven to be not so intransigent. The solicitor replies to this question as to what they are trying to say by stating that the statementing has been done but only up to a certain age (lines 284 and 285).

At this point the chair re-enters the discussion by quoting a reference to an act of parliament for the provision of statementing (lines 286 and 287). The solicitor begins to re-iterate their position, a position gradually being built-up through the discourse. The solicitor states that it is the ceasing to provide a statement that is the issue here - rather than a non-provision from the start - and that this is a policy towards children with special educational needs (lines 288 to 292). The chair interrupts the solicitor to ask what evidence they have for this claim (lines 293 to 294).

In response to the chair's request for evidence, the solicitor enters into a list of 'facts' of various types, which are intended to prove the truth of the claim about a policy of not providing statements for children between the age of sixteen and nineteen. This information is initially about their local education authority for which he offers no documentary evidence (lines 295 to 314), then he refers back to the Dorset case, referring to the documentary evidence of The Times report of a case there - evidence which has already been criticised by the chair (lines 315 to 336). The solicitors seems to challenge the chair and states "if read carefully" (line 321).

Instead of responding directly to the solicitors re-statement of his position towards the current case and the salience of the 'Dorset Case', the chair asks the parents of the child what is the current state of the child's

education (lines 337 to 339). The mother responds that their child was a borderline case for entry into the college and that he has "very difficult" behavioural problems, and that the college does not have to keep him as a student (lines 340 to 345). One of the panel members at this point asks if he is still there though (line 346), to which the mother replies in the affirmative but goes on to offer a letter as evidence that his presence there is problematic (lines 347 to 349). The ability here to provide documentary evidence by the mother to show how tenuous the child's continued stay at the college does, in light of other documents that they have not provided, seem to show that the mother was anticipating its use. This is interesting in that the child's problems at the school and the consequences of such a state of affairs, has not been part of the solicitor's argument.

None of the panel members asks to see this document offered by the mother, its physical presence is taken to be enough, rather the panel member goes on to 'clarify' that there is a special unit within the college. In making this request the panel member refers to the original statement for legal aid where a statement to this effect is made (lines 350 and 360), this is a reference to the application for legal aid that was refused and presumably not the appeal, although it is not too clear here. It is noticeable here that the panel members are going back to the original application documents in their attempts to clarify the current state of the child's education, they are not referring to the particulars of the solicitor's summary of the case. In fact this line of questioning excludes the solicitor from representing the parent in that it is directed at the parents, and is the type of question that only they are likely to know the answer to.

The mother replies that there is a special unit within the college but they do not usually deal with cases as severe as her son's (line 352 to 354). She then goes on to formulate what she means by this to say that if the child is not restatemented, and then asked to leave college for behavioural reasons, then he has lost his 'right' to education until he is nineteen. Whereas if he is statemented, and then asked to leave college, then the local education authority has a duty to provide him with education (lines 352 to 354). She then

reformulates this to say that without a statement he has nothing to "fall back on" (lines 363 and 364). This is then reformulated by the panel member in terms of her saying there being no problem at present but that there may be in the future (lines 365 to 366).

However, the mother picks up on "there's no problem at the moment" (line 364), to say that she is not happy with him at the college and gives an example of a recent near accident, before questioning the college's ability, via a contrast, to look after him (lines 367 to 373). The panel member does not attend to this accusation of inability on behalf of the school, but instead asks how far the college is from where the child lives (lines 374 and 375), this would seem to be a minor topic change. The mother gives the distance (line 376) to which the panel member replies that is not far for them (line 377), which the mother then contextualizes in relation to the closeness of the child's previous school to the college (lines 378 and 379). The panel member acknowledges this statement (line 380) but does not follow that line of questioning any further and there is a long pause, eight seconds, before the chair asks the panel if there are any further questions (line 381). It appears this line of questioning by the panel members has come to a halt.

When this offer of further questions is not taken up, after another long pause, four seconds, the chair asks if the child's previous school had provision for boys between sixteen and eighteen years old (line 381 and 382). The mother answers "no" to this (line 383), which the chair questions in some surprise (line 384), to which the mother repeats her negative answer (line 385). The chair begins to ask a question (line 386) which is anticipated by the mother who states that the county council has no provision for that age group (lines 387 to 389). To this the chair repeats in question that there is no provision (line 390), to which the mother confirms in the negative before the chair finishes (line 391), which the chair appears to accept (line 392). The mother continues to stress that there are no designated schools (line 393) but is interrupted by the chair who asks if she is "absolutely sure" (line 394). The mother confirms that she is (line 395) to which the chair questions again in the form of a question as to there

being "no provision at all" (line 396), to which the mother gives the proviso that this is only within the colleges (line 397). What we see here is that the chair finds it difficult to believe what the mother is saying, the reason being that there is a statutory duty on the part of the local education authority to provide such schools.

It is at this point that the solicitor reenters the discussion, and does so initially on behalf of the mother to clarify what she is saying to the chair, and which the chair has difficulty in believing. The solicitor's talk overlaps that of the mother when she is saying that there is provision in the colleges, and his initial comment is in partial contradiction with his client as he says there is provision (line 398). He goes on to elaborate that there are two types of special needs, statemented and non-statemented, that provision is made for non-statemented children with learning difficulties in normal schools but that they cannot provide for statemented children (lines 399 to 409). Helped by the chair (line 410), the solicitor then gives some of the historical trends in the past as to how the system was managed (lines 411 to 414), but that this has changed due to the local authority no longer allowing special schools to plug the gap for sixteen to nineteen year-olds (lines 414 and 415). A fact that the solicitor believes has caused there to be a "lacuna", or gap, in the provision of education for statemented children with special needs (line 416).

After the solicitor has cleared up the difference between statemented and unstatemented children with special needs and reformulated his argument again, the chair tries to apply this to statutory law. The chair states that as he understands it the solicitor is saying, and he quotes from the Further and Higher Education Act 1992, that a local education authority has to provide education for persons of the sixteen to nineteen age group (lines 416 to 425). And that the local education authority in question is failing to do that in respect of this particular child (lines 425 to 427). In response to this the solicitor initially agrees with the chair, but goes on to say that that formulation is a broadly based proposition "that could apply to other children as well" (lines 428 and 430). While the solicitor is saying this the chair tries to show disagreement with this

version but the solicitor continues (lines 429 and 431). It is when the solicitor again tries to re-present his version of the case (line 432), that the chair succeeds in halting the solicitor. At this point the chair reminds the solicitor that the application for legal aid has been made on behalf of a specific child, and that it is that child's concerns that they are here to deal with, not the education policy of the county (lines 433 to 438). The chair then goes on to address the parents saying that they, the parents, are claiming that their child has not been provided with full-time education (lines 438 and 439). The mother makes an unclear remark at this point (line 440), while the chair finishes his sentence noting that the child is still at a college (line 441). The mother, a bit 'incoherent' at first, then goes on to qualify this provision of education at college by saying that this provision is not down on the child's statement (lines 442 to 445).

The chair then goes on to spell out what he believes is the mother's worry, that her child could be removed from school at any time (line 446). The mother then reformulates this as being that if he was removed he has no education provision described on a statement, hence "he's got nothing" (line 447). The chair then gives the reason why the child would have nothing, due to their place at college being funded not by the local education authority but by a 'training council' (line 448). The chair then goes on to say that he believes he thinks he now understands the case and after a pause asks the 'appellants' if they have anything else to add to the case (lines 448 and 449).

The solicitor takes up this offer and states, contrary to the position taken by the chair (lines 432 to 437), that the case is "public law matter", and although the child on whose behalf the case is being brought is an interested party, other children may be affected (lines 450 to 454). The solicitor carries on to say that if they are seeking a judicial review, it may not be merely a "declaratory application" but an "application for mandamus"²² (lines 454 to

²² Mandamus: "A high prerogative writ which is issued in the King's name from the High Court of Justice on application to the King's Bench Division to some person or body to compel the performance of a public duty. It was

456, 458, 460, and 461). The last part of this has been met by token agreement by the chair (lines 457 and 459), the chair then slightly overlaps with the solicitor with more agreement before asking again if that is all (line 462 and 463). There is a sense in which these token agreements and the final agreement given before asking if "that all" (line 463), are done not necessarily in full agreement but rather as a way of drawing this phase of the tribunal to a close. However, it is not a 'definite' closure and the solicitor takes the opportunity to carry on.

The solicitor uses this opportunity to stress that they, "we", are seeking the implementation of the regulations not just for the child in question here but for all such children (lines 464 to 468). The chair acknowledges this as a factor here and asks if there is "anything else" (lines 469 and 470). It seems that the solicitor is determined not let these opportunities to speak offered by the chair to go amiss. Following this opportunity the solicitor asks the parents if there is "anything else" (line 471), and after a short pause starts to discuss why the original application was refused monies (lines 471 to 473). The solicitor then goes on to talk about what the tribunal's function is, and what it is not. He states that this is not a review of "a judicial review application" but an appeal tribunal (lines 473 to 477). That the case was prepared for this tribunal with the aim of being given legal aid monies, and to allow the case to be presented in court. Hence any weakness (with regards the judicial review) in the case is due to this reason (lines 477 to 482). Then the solicitor goes on to say that on the basis of what they have presented to the tribunal today, they think it has been "established" that they have something "substantial", and at very least should be awarded monies for a counsel's opinion (lines 482 to 486).²³ To which the chair offers recognition of what the solicitor has said and asks them if they would care to wait outside, thus bringing this phase of the tribunal to a close

replaced by an order of Mandamus which is now comprised in the procedure known as Judicial Review. Applications for judicial review are made to the Divisional Court" (Osborn's Concise Law Dictionary 1983:213).

²³ Note how this differs from a case without a solicitor.

(lines 487 and 488).

Summary.

This is a long transcript and much that occurs is of interest, however we can briefly state the interaction as consisting of: A first 'phase' of a tribunal in which the panel discuss the case and find questions to ask the appellant, and noting that there will be a legal representative present. In 'phase two', the attenders are orientated to the case and introduced to the panel by the clerk and the chair of the panel. The solicitor who is the appellant's legal representative attempts to orientate the panel via the use of a chronology of the case, though he is not allowed an uninterrupted rendition due to questioning from the chair. The representative and the chair enter a series of discussions each attempting to give, and have accepted, their version of the issues involved, resulting in a number of reformulations in the face of opposition from other parties. The chair drops out of the discussion for a while which is taken up by one of the panel members, though the chair soon re-enters the debate. The chair then asks questions of the parents which are responded to by the mother, though their legal representative rejoins the discussion when his client makes an erroneous point. The discussion between the chair and the legal representative continues with some increased 'control' by the chair as to the nature of what the case is about, though the representative uses the closing comments of the chair to restate his version of the case and what it should be awarded by the panel. The phase then closes and the appellants and their representative leave the room. We can explore this data further if we look at the work the solicitor does as a legal representative.

We may assume the legal representative for the appellant performs some work of representation in its broadest sense prior to their attendance at the tribunal session. Though we cannot say from the present research what that might consist of, we can probably safely assume the appellant is given some sort of outline of the nature of the upcoming tribunal.

The first activity described in the data constituting the work of the legal representative began almost immediately on starting 'phase two', when the solicitor corrects the clerk as to the respective names of the appellants (line 44).²⁴ The clerk when introducing the case also describes what is going to happen in the tribunal and in so doing indicates what the possibilities and likelihood of actions to be taken are, thus laying out and giving directives for the following interaction, and indicating the role of the representative. The chair runs through a list of the case documents the panel have seen and this listing of the documentation draws attention to the centrality and importance that it is accorded, and that it will be the focus of ensuing discussion.²⁵ The chair also takes this listing as an opportunity to 'repairing' an 'erroneous text' by correcting it.

Following the chair's introduction and request to be 'taken through' the case (lines 59 to 77), it is the appellant's representative who literally speaks on behalf of his clients and their case. This literal representation is done to produce a presentation of the case through a re-presentation of the "facts" contained in the documentation (textual representations) through a chronology (line 78). This is a very controlled form of story-telling in which the solicitor informs the panel that the focus will be on the interests of the child - or at least "beginning with" (lines 78 and 79). This flagging of "beginning with" may be seen as an early notification that there is more to the case than just the interests of the child. It

²⁴ What has happened here is that the clerk has confused the appellants name with their solicitor's. This displays the usefulness of this procedure of a summary of the case by the clerk in that it clarifies who is who, and that the correct documentation has been looked at. This is similar to the second case (case two) in Chapter Three.

²⁵ Komter (1995:126) gives us some insight into what is occurring here when she states:

"The presentation of 'the facts' by judges may seem a straightforward matter as long as they are undisputed. 'The facts' as they are known by the judges from the dossier are brought forward for the defendant's confirmation, disconfirmation, or amendment. In this way a body of knowledge is built up that everyone can agree on."

is interesting that the chronology of the child's problems starts with a statement of the child's current age, sixteen (line 79), thus indicating the length in years of the chronology, before working through the events relating to the problem in a chronological order beginning with the child's date of birth (lines 79 and 81). Although the mother's concerns transpire as being beyond the sixteen year chronology.

This chronology is interrupted by the chair who requests 'statutory references' which the representative does not have available, however the representative suggests an alternative source of information and introduces this as a substitute to the initially requested documents (lines 92 to 95). This would seem to display more work of the representative, the ability to manipulate the use of documents so as to retain some control over the direction of the discussion of documents i.e. representations in textual form. What this request for statutory references is actually doing is not so clear, as at first it seems to be a substantiation of the legal requirements noted by the solicitor. It also appears to direct the solicitor to make the chronology text based. However, it may also be seen as a mechanism by which the chair keeps some control over the direction of the interaction and flow of information. The reasons for this control may be as simple as to have the facts not come so fast at the panel that they can not form a stable picture of the case. When the chair asks the representative to read the 'substitute' (lines 96 and 97),²⁶ the request for a quotation possibly does more than inform the chair and the panel of the exact wording of the guide book, it may, as the previous request for statutory references was doing, also be controlling the solicitors monologue.

However, when the solicitor states that they "didn't want to dwell on this point too long" (line 110), this seem to their attempt to gain control of the direction of the interaction from the interruptions and questions of the chair.

²⁶ What we have here is a description of reading located in situated and ongoing activities. What this illustrates is that the context of the reading is extremely significant in the understanding of the text and the practices displayed.

This is arguably another aspect of the work of the solicitor as representative, trying to control the direction of the interaction of the tribunal rather than just responding to the questions given by the panel members. That these practices are engaged in is supported in that the solicitor's chronology did not proceed far before clarification of it was requested, thus breaking the flow of the chronology.

This attempting to retain control over the discussion and interpretation of documentary representations is displayed on a number of occasions, and the ways in which this is attempted are never exactly the same. For example when the chair again asks for a document that is not available, though of course the chair can request in equally numerous ways (line 111), the representative states that one was not "as far as I can ascertain" drawn up (lines 112 and 113), ignores an interjection by the chair and moves onto another document (lines 116 to 121). What is noticeable here is that the solicitor has not directly, or at least conclusively, answered the question of the chair as to whether a transition plan has been drawn up. The solicitor has tried to move on beyond that question to talk about the last statement of needs for the child, and how this further information relates to the case for which legal aid is applied for. Possibly ignoring the question so as to remain in control of the direction of the discourse.

We see the solicitor responding to questions directed at the mother for example in response to a request for the child's age (line 128). It is the solicitor who replies here in reaction to the mother's answer to the previous question in which she appeared to get a little confused over the 'statement' of needs for the child, and the transitional plan (lines 125 and 126). By the solicitor taking over the answering, he is able to keep the direction of the questioning clear of confusion which may be a prospect if the appellant is allowed to continue. Also, unlike the solicitor the mother does not attempt to use her turn to do anything other than confirm the question, she does not try to lead in any direction of her own design, in contrast to the 'technique' of the solicitor. Doing this the solicitor may have to resort to cutting in on, and cutting off, their own client.

Unlike a court where the appellant will speak through their legal representative except when in the dock, in the legal aid tribunal the appellant does not have to rely on their representative, and may speak at times and about topics that appear inopportune for their solicitor's strategy with the panel. This may be seen to be the case here when the mother mentions a letter sent by the local education authority, but then cannot provide the letter, its mere existence has distracted the chair from the route that the solicitor was trying to take the panel down. At first the representative tries to divert the chair's attention away from the letter and to regain control of the direction of interpretation (line 155), but when this fails offers to produce "a bundle" of documents dealing with these issues. This management of the documents and discussion consists of situated actions that are context dependent. For example when the chair is attempting to strengthen their position by quoting from a document (lines 205 to 215), the representative displays active management of the documentation representations via a continuation of the quote which lessens its impact (line 216). This also illustrates that the chair has to monitor the conversation and make sure that the solicitor does not take control, thus managing to avoid 'tricky' areas that may be of concern to the panel. An example of this is when we see the chair summarizing the information that the panel have been presented with, and formulating this as a case which has been offered to the appellants for confirmation. The chair legalises this version of the case by framing it with direct reference to an Act of Parliament, reads out loud what he considers to be the relevant section of the Act (lines 417 to 427).²⁷ The solicitor attempts to add his own angle to this version (line 428, 430 and 432) but is rebuffed by the

²⁷ Quoting from the Further and Higher Education Act 1992, that a local education authority has to provide education for persons of the sixteen to nineteen age group (lines 416 to 425). The chair can be seen here as narrowing the discourse to the specifics of a documentary text, i.e. focusing the interaction. And that the local education authority in question is failing to do that in respect of this particular child (lines 425 to 427) the chair is attempting to focus the case down specifically to the child in question. The reason for this may be that when presented in this form it becomes amenable to the decision making of the tribunal panel in a form which the chair would prefer.

chair who then addresses the appellants directly (lines 433 to 439).

This work of presenting the case has involved addressing the questions of the chair and his attempts to take the discourse in a different direction to that deemed most profitable by the solicitor. It has also included the management of the utterances of the solicitors client when they have threatened to take the discourse away from that planned by him, and dealing with any information released inadvertently by the client.

Much of the work of the representative seems to consist of spotting, selecting, and using occasions with which to press their version of the documentary representations and the talk that has built up around them in the tribunal. This is displayed when the chair drops out of the discussion and a panel member takes over, the panel member asking a question relating to how a 'proposal' is produced asks if this is done by the local education authority at meeting or by a "proper procedure" (line 270 to 273). The solicitor, replying to the question describes the process of statementing rather than proposal construction (lines 274 to 283). To which the panel member inquires if the solicitor is saying that this has not been done (line 284). What is noteworthy here is that the talk has gone from talk of the proposal to talk of the statement, what the solicitor has been attempting to do all along. Previously the chair was not moving from his focus on the proposal but the panel member has proven to be not so intransigent. The solicitor has again got round to stressing the nature of their case, successfully moving from proposals to statementing, and also to reintroducing the court case from Dorset and stressing its similarities with the current case.

It is interesting that the talk of statements and proposals is actually referencing documents, but these documents are not offered to, or request by, the panel. The documents remain in abstract. It is here we see that the documentary representations, texts, are not separate from the verbal interpretations that are built up around them in the situation of their use. The clearest example of the representative using the opportunities available to press their version of the documents and case on behalf of their clients, is when

taking the opportunity to sum up their case,²⁸ the representative goes so far as to recommend the minimum award they should be given (line 484 to 486). I suggest that in these last few turns we have seen the work of the solicitor in its most obvious form. As the representative of his clients the solicitor has taken the opportunities offered to him by the chair, and used them to restate what the solicitor wants the case to consist of. The solicitor firstly restates that this is a case for judicial review, not a declaratory application but a one for mandamus (lines 454 to 456, 458, 460 and 461). Secondly, that the case is for the implementation of the regulations to all children not just this one child (lines 464 to 468). Thirdly, stating what it is that they are all doing here today, so informing the panel of their task. Fourthly, that there may appear some weakness in the case as presented, but that this hearing is just to obtain legal aid monies and is not the full case. The solicitor then goes on to make suggestions as to what the outcome of the panel's decision making should be. After having 'fought' to get his version of the case over to the panel, the solicitor has taken the opportunities offer him here at the end to reiterate and expand upon his and his clients version.

Finally, we can see that the legal representative represents the clients and the 'case' in interaction with the tribunal panel, and actively re-presents the documentary representations. Although this representation of the client differs from an artifactual representation of an object, in the sense that the client of a representative can usually speak 'orally' on their own behalf, where as this is not so with an artifactual representation. This speaking 'on their own behalf' by clients can be problematic for a representative who may have spent a large amount of effort in building a version of the documentary representations and their surrounding talk, only to have it 'undermined' by their client.

²⁸ This asking if an appellant has anything further to say, allowing them to sum up their case, is a common feature of the drawing to a close the work of hearing the appellant. Though few unrepresented appellants proceed with the ability of the solicitor.

Case Five Phase Three.

This case follows on from phase one and two described above.

1 ch :okay (.) fine (.) thankyou (3.0) would you like to wait outside
2 (23.0)
3 pm1 :how (did you claim for the) (unclear) (1.0)
4 pm2 :I understand the point about the fourteen point (.) I eh (.)
5 (unclear)
6 pm1 : [I think I got to grips with it eventually but (.)
7 ch :what they are supposed to for a for a (.) I can't give you a
8 statutory reference for it (.) what they are supposed to do for a (.)
9 a fourteen year old who's (.) statemented (.) but it's eh (.)
10 pm2 :but but it's done before or after birthday it seems here that they -
11 ch : [no
12 pm2 :-haven't done it? (.)
13 ch :what I was asking (0.2) really was (.) this (.) what what their last
14 statement statement which was supposed to carry him through (.)
15 fourteen to nineteen (1.0) and the answer was well we don't know
16 do we (0.2)
17 pm1 :fourteen to sixteen (.) (unclear) (0.6)
18 ch :yess I mean (.) if if (.) I mean there is that (procedure?)
19 pm3 : [the
20 (budget?) account's a basic transitional document isn't it (.)
21 pm1 :what she's concerned about is that if he is (.) removed from this
22 present school he's got nowhere to go (.)
23 ch :ummh (.)
24 pm2 :well I can understand that (0.6)
25 ch :and he's (.) I mean this is a common concern with many children
26 who are perfectly normal who in the maintained sector if they are
27 chucked out of (.) sufficient schools and (unclear) (0.8) the statute
28 sez that where you have a child of special educational needs (.) the
29 council has a duty to provide for those needs and then (.) and that
30 that's their best point which (.) they're not
31 pm1 : [he seemed to gloss over
32 didn't he
33 pm3 : [well (0.2)
34 pm2 :I think (0.4)
35 pm1 :I would still grant it (0.4)
36 pm2 :the big point he made at the end was fair this wasn't it in the
37 sense that he he this wasn't the full hearing (.) therefore we
38 perhaps shouldn't be too (.) judgemental on the actual (0.2)
39 pm1 :(wuarr?) (0.2) I don't know about you but I was coming round
40 to the

41 ch : [if you all to the library and get the book (.) you can all read
42 it and come to some decisions on it [tapping a large volume of
43 apparent statutes] (.) can't we (.) I mean I did that (0.2) (inhale)
44 okay (.) how about you (.)
45 pm3 :well my my initial (.) my initial view I think (.) allow limited to
46 counsel's opinion (.) then merits for proceeding (.)
47 ch :yeah (.) I mean fortunately fortunately here (.) it is an ongoing
48 it's an ongoing refusal so it's no decision which I mean we're not
49 in the time limit situation (.) I mean I'm slightly aghast at the fact
50 that (.) the fourteenth birthday was so long ago (.) it should really
51 sorry sixteenth birthday was so long ago they should really have
52 got on with it before now (.) but it doesn't really matter because
53 it's it's an ongoing refusal so (.) we're not we have no problem
54 with errmm (.) the three month limitation (.) so err counsel's
55 opinion (.) err yeah okay-
56 cl : [right
57 ch :can we have them back (.)
58 cl :right thank you (36.0)

Initially we have the concluding of the previous phase where the chair has asked the appellants and their representative to wait outside the tribunal room (line 1). Although the chair gives no explanation of the reason for this it is implicit in this statement that the panel will now consider the case and the statements made by the appellants and their representative and come to a decision.²⁹ The appellants take a while to vacate the room (line 2) though while this occurs no discourse is engaged in by the tribunal panel, either relating to the case or otherwise.

Once the appellants and their representative have vacated the room the third 'phase' of the tribunal commences with an unclear comment by panel member 1 (line 3), though it seems to be a question to a panel member or all/any panel members. This is followed by what appears to be a response by panel member two (lines 4 and 5), that they, panel member two, understand the point that was made by the solicitor in the previous phase about the

²⁹ Fuller descriptions are often provided by the chair, though when a legal representative is present, as in this case, the chair may be assuming that they are aware of the process of the tribunal. Certainly this instruction is not taken to be problematic by the appellants.

requirements of statementing of the child at the age of fourteen. At this point panel member one rejoins with a similar confirmation on this point but this is prefixed conditionally with the term "I think" (line 6). It is also emphasized that they did not do so immediately, they then start to continue but leave a micro pause which is taken by the chair as space in which to interject. The chair begins by attempting to clarify what the local education authority are supposed to do for a child with special educational needs at the age of fourteen (lines 7 to 9). He breaks his description though to state that he can not provide them with the statutory reference for this though (lines 7 and 8). Panel member two then states that the local education authority have not done this in this case (lines 10 and 12).

While panel member two is illustrating his understanding of the issue (lines 10 and 12), the chair, in overlapping speech (line 11), though not causing panel member two to stop in mid-sentence, begins what seems to be a repair of the inference he has made of the two panel members' understanding of the issues. It is this which panel member two is in the process of at least partially correcting by displaying his understanding of the case. The chair does this with use of "no", which seems to indicate that he was not indicating that his colleagues did not understand the issue. The chair manages the repair by referring to what he "was asking" (line 13) the appellant and their representative. This was, what are the details of the child's last statement, the one which should have "carried" the child's education from fourteen to eighteen years of age contained (lines 13 to 15). He adds that they, the panel, were not able to obtain this information (lines 15 and 16). Panel member one then corrects, and also displays his grasp of the issue which the chair had 'doubted', stating that the child's statement would cover him from fourteen to sixteen not fourteen to eighteen, and says something which is unclear and after which there is a slight pause (line 17). The chair acknowledges the correction and after a micro pause seems to be about to say something further, "(.) if if (.)", but then seems to take a different direction to note that there is a procedure to be followed (line 18). At the end of which panel member three, who has remained

silent so far states that the "budget" -this is unclear - is a "basic" transitional document i.e. one that may perform some of the roles of a statement (lines 19 and 20). Unfortunately this point is not too clear. However, panel member one follows on from this by stating the practical concerns of the mother, her child having a guaranteed education, and moves away from direct discussion of documentation and process (lines 21 and 22). This issue is acknowledged by the chair (line 23), and then the mother's concern itself acknowledged as understandable by panel member two (line 24).

The chair then takes up this point and addresses it as being the concern also of people outside of special education if their child is removed from enough schools (lines 25 to 27). After a short pause, the chair continues and brings the issue back to the case by paraphrasing the statute relating to the concerns of the mother, and stating that that aspect of the statute is "their best point" (lines 27 to 30). He seems to be continuing to say that they are not following this (line 30) when panel member three 'interrupts' by saying that the solicitor representing the appellants seemed to "gloss over" that point (lines 31 and 32). Panel member three seems to be making a hesitantly negative response to this (line 33) which is not continued, after a short pause panel member two seems to be about to add their opinion but then stops (line 34). After another short pause panel member one continues stating that he would still grant the appeal nevertheless (line 35).

Following panel member three's statement that they would allow the appeal (line 35), panel member two refers to the point made by the solicitor at the end of the previous phase when summing up his case that this appeal was not a full hearing of the case but an appeal against the refusal of legal aid (lines 36 and 37). Panel member two continues, in seeming agreement with panel member one's previous opinion of granting the case, to say that the panel should not be too judgemental - about the case presentation presumably (lines 36 and 37). Panel member does not finish their statement but leaves the end 'hanging', which, after a short pause, is followed by panel member one making a 'noise' and starting to state the position which they were "coming round to"

(lines 39 and 40). However, panel member one is cut off by the chair chastising the panel members for not having read the relevant statutes,³⁰ as he did, which would have allowed them to make a decision (lines 41 to 43). The chair then asks panel member three what their opinion was (line 44).

Following the chair's request for their opinion, panel member three offers their opinion, which they frame as their initial opinion, that the panel allow the case legal aid but restrict it to counsel's opinion to see what merits the case has for proceeding (lines 45 and 46). It is worth noting here that panel member three frames their answer as being their considered opinion before the case hearing, rather than a decision based upon the presentation by the appellant and their legal representative i.e. not based upon the non-statutory evidence that the chair has just criticised the other two panel members of basing their opinions upon. Although panel member three does not make any direct reference to the legal statutes.

The chair then rejoins with an agreement (line 47) and continues with a discussion of the specifics of the case regarding the eligibility of the case for legal aid (lines 47 to 53). This discussion relates to the time passed since the problem arose, and that if it had not been an ongoing problem it would have been ineligible due to the lateness of the application in relation to the "three month limitation"³¹ (line 54). The chair then repeats, in agreement, panel member three's opinion (lines 54 and 55), which is acknowledged by the clerk as being their decision on the case (line 56), and then asks the clerk to bring the appellants and their legal representative back (line 57), the clerk then acknowledges the request and thanks the panel (line 58).³²

³⁰ This is a book of statutes which the chair has read from in the second phase of this case.

³¹ This reference to limitation refers to the prescribed periods within which proceedings to enforce a right must be taken, the reference by the chair here is in relation to the Education Act limitations.

³² Note that there is no talking in the transition period here.

Summary of Case Five Phase Three.

The third phase of this case begins with panel member two, after an unclear question by panel member one, picking up on one of the issues that was central to the appellants case in the previous 'phase', and stating that they understood that point. This initial point is taken up by panel member one who hesitantly confirms that they too understood this point. The chair seems to take this hesitancy, which seems to be evident in both the statements of the two panel members, as a lack of clarity on the issue and an attempt at clarification of the point. Two things occur here: Firstly, the raising of an issue for discussion and a clarification of what that issue initially is. Secondly, the chair beginning to describe what the issue is, and noting his inability to give a statutory reference for the point, although in a manner which suggests that he could eventually provide one. It is notable that the lack of statutory reference is not taken by himself, or the others, as problematic. This appears to indicate that reference to documentation does not have to be in an 'exact' form for the other panel members to accept considering its reported content in this instance. Similarly, an absence of a full and technical understanding of the relevant law does not prevent consideration and decision-making by the panel members. Issues for discussion are raised, but those that refer to relevant statutes are discussed in general terms and are not attended to as being of singular importance. The discussion of the case allows various aspects to be raised and for these to be corrected where some confusion exists, but there is no real focus on the exact details of the case.

What we can see in this part of the transcript is significant in that it begins with a move away from an initial discussion of the panel members' understanding of a specific issue of the statementing process, to what that statement should contain and the procedure which it was embedded in. It then moves rapidly away from the legal responsibilities of the Local Education Authority to the practical concerns of the mother. These concerns are then embedded by the chair back into the statutory responsibilities of Local

Education Authority, this being done by the paraphrasing of the relevant statute - the statute is not named but its existence is not questioned - and that this is the appellants best point. The actions of the legal representative in relation to this point, his glossing over it and lack of focus on it, are then pointed out. But the same panel member then states that he would still grant them the appeal.

What we see is a rapid move through some of the issues to a volunteered course of action which is based upon an identification with the parental concerns of the mother, and framed within the general duties of the Local Health Authority. The argument of the solicitor which referenced the specifics of the statementing process is virtually ignored after the initial orientation of the panel to the decision making process, in favour of an identification with the concerns of the mother and the stance of the chair. Panel member two refers to the appellant's legal representatives point that, the representation that the panel are considering is not the ability of the case documents to win the case in court about the legal responsibility of the local education authority, but the representation as constituting a successful appeal against the refusal of legal aid. Something that the appellant's representative had requested them to do in the previous phase (see Chapter Five). After a small tirade by the chair about the need to read the legal statutes, the panel grant the award at the level suggest by the appellant's legal representative. The case is interesting in that the chair shows concern that the panel are making decisions without using the statutory references. The chair seems to indicate that this is not sufficient in his opinion and that they should have read the relevant legal statutory background material which would have allowed them to come to a judgement on legal principles rather than 'common sense'³³ reasoning. The chair, however, does not take this criticism further, or decide to act upon the criticism, for example by suggesting the adjourn the case until they have read the relevant legal texts, rather he continues the discussion from where it left off, i.e. the opinions of the panel members. So although they seem to be consciously aware that their decision

³³ By 'common sense' I do not mean reasoning devoid of any legal understanding, but the members' common sense of lawyers.

making is not based upon legal 'positivism', it does not prohibit the continuation of the decision making process - nor does it make it less legal. Hence we see that the legal statutes are not necessarily central for practical legal decision-making in this instance.

It is worth noting that the clerk has been monitoring the discussion and speaks initially when a recognisable decision has been made. Although the clerk has to write the formal decision down, the clerk does not ask for a finalised version, nor does the chair offer one, it seems mutually acknowledged that the clerk has followed their discussion and recognised their decision and will transfer this in an adequate format into the relevant documents. Thus we see that the textual product which the clerk records is not in the words of the panel, but in this instance formulated by the clerk themselves - no doubt in accordance with his perception of the future and potential uses and needs of such documentation.

A point that is illustrated by this case is that even after the presentation by the appellant and their representative, there is still some confusion as to the exact nature of the case to be decided upon.

Case Five Phase Four.

The following transcript is of 'phase four' Case Five, the three prior phases having been described above.

1	cl	:right thank you (36.0)
2	?	:thankyou (.) [clerk returns with the appellants] (7.0)
3	ch	:thankyou very much for coming today mister and misses
4		(surname) it's always (.) very (.) useful if we can see (.) err
5		applicants in this case (child's name)'s parents (.) thank you very
6		much mister (solicitor's name) for coming and trying to explain (.)
7		the background to this matter it is very difficult (0.2) I think you
8		have a very considerable problem here (0.6) on the other hand we
9		do think that it's a problem that does need to be redressed
10		therefore we are granting you a legal aid certificate limited to
11		taking counsel's opinion (0.2) on the issues (0.2) this will take a
12		lot of preparation and I'm sure in mister (counsel's name) you've

13 pick one of the few specialist counsel who know about these
 14 matters who can (.) give a useful opinion which can be relied upon
 15 (.) thank you very much for coming (.) I wish you good fortune (.)
 16 m,f&s :thank you very much (6.0)
 17 cl :next one is (surname of appellant)

At the start of this segment of transcript we have the end of 'phase three' where the clerk thanks the panel for their decision on the case (line 1). There follows a long transition period while the clerk goes out to bring back the appellants, in this period the panel do not talk further of the case or any other topic. The silence is broken by one of the returning appellants, either the husband, wife or solicitor thanking someone while retaking a seat (line 2). There is another silence while they get seated before the chair begins.

The chair begins by thanking the parents for attending and that it is helpful when appellants do attend (lines 3 to 5). The chair then thanks the solicitor for coming and trying to explain the case background (lines 5 to 7). The chair then goes on to state that he considers it a difficult matter (line 7), but that he and the panel, "we", think that the case addresses a problem and it is a matter that needs to be "redressed" (line 7 to 9). The chair then announces that they are granting the appeal but that it is "limited" to taking a counsel's opinion (lines 10 and 11). The chair continues by stating that an opinion on this case will take a lot of preparation but that in the counsel the appellants have indicated they wish to give an opinion, they have chosen a specialist whose opinion can be "relied upon" (lines 11 to 14). The chair then thanks them for coming and wishes them "good fortune" with the case (line 15). The appellants in unison thank the chair and panel (line 16). There is a period of silence while the appellants leave, and then the clerk introduces the next case.

Summary.

The whole delivery of this decision is carried off smoothly by the parties concerned, very much in contrast to the earlier phases of this case which involved a lot of debate - especially phase two. If one was to speculate as to the

reasons for this, one reason may be that, due to the work of their legal representative, the appellants managed to put forward a case which addressed all their concerns. In doing so this forestalled the raising of issues at this later period in the hearing. Some evidence towards such an interpretation is given when the chair thanks the parents for coming to the tribunal stating that it is useful when they do so (lines 3 to 5). Although the chair does not directly note the role of their legal representative it seems that this to can be inferred to be a useful occurrence.

We have seen from the previous phases that the panel have discussed the case in some length with the appellants and that the chair does not fully agree with the approach to the case by the appellant's solicitor. This is reflected for example in the chair adding his opinion of their having "a very considerable problem here" (line 8). He expresses this as his own opinion with the use of "I" (line 7), whereas when he says that the problem nevertheless needs to be redressed, he expresses this as the opinion of the panel as a whole with the use of "we" (line 8). However, as noted above none of the protracted discussion of the previous phases gets referred to in depth and the delivery of the decision is given as a representing united position taken by the panel.

That the decision of the panel is of a legal aid certificate limited to a counsel's opinion, is also interesting in that this was what the appellant's solicitor suggested as the minimum that their appeal warranted while summing up in 'phase two' of the appeal. Though it is not easy to show the influence that this has exerted on the panel's decision.

The chair does not really offer the appellants or their solicitor any chance to comment on the decision, and he seems to achieve this by finishing his turn by thanking them all for coming and wishing them good luck (line 15). This does not prevent further discussion or questions, but does result in eliciting thanking acknowledgements from the appellants and solicitor (line 16). The appellant's do not ask any further questions, as unrepresented appellants occasionally do as to the future actions of the Legal Aid Board with regard to their case, possibly as their solicitor can be expected to inform them - possibly

why the chair does not offer such information either.

Case Six³⁴ - (Venue - See Appendix One Venue Number Four).

One of the panel is the appellant's solicitor for this case and as their representative has presented an interpretation of the case documents for the panel. Thus providing representation for the appellant while the appellant is a non-attender. The representative though does not play any part in the decision making which is performed by the three remaining panel members. The case is a claim for damages against a police surgeon. The third 'phase' is quite short in this case and can be presented in one segment.

- 1 pm1 :well I'd be inclined to grant it to close of pleadings and (.) let it
2 be reviewed at that stage at that stage they'll know what ehh (.)
3 what the other (parties) are gonna do (0.4)
4 pm2 :no I would refuse it because I don't think that a fee paying client
5 of moderate means bearing in mind the quantum of the claim
6 would would proceed with it (0.4) unless of course an offer was-
7 ? : [mmh
8 pm2 :-forthcoming yuh err mister (solicitor's name) there indicates that
9 he had a letter inviting him to consider quantum all he has to do
10 now is contact them and consider quantum (0.2) and if an offer is-?
11 : [mmm mmm
12 pm2 :-forthcoming that is satisfactory he can settle it without (.) legal
13 aid (.) I don't think a fee paying client of moderate means would
14 embark upon (.) this sort of expensive litigation (.) just for the
15 sake of ff a few hundred pounds (0.6)
16 ch :okay (.)
17 pm1 :I agree with that (.)
18 pm2 :it doesn't stop (solicitors first name) from reapplying at a later
19 date does it (unclear) (.)
20 ch :no (2.0) nyeh okay fine then (.)
21 cl :so you're refusing him
22 ch : [yes we are (.)
23 cl :okay (13.0)

This 'phase' of the case starts after a transition period between 'phases'

³⁴ Data session 10 tape 1 case 1.

two and three of the case hearing, in which no oral interaction between the panel occurred. It starts with panel member one giving their opinion on the case, that they would grant the appeal to close of pleadings.³⁵ Panel member one suggests that the merits of the case can then be reviewed at that stage in light of what the other parties to the case will do (lines 1 to 3). Panel member two disagrees with this saying that they would refuse it due to the size of quantum, and that no fee paying client would undertake such legal action (lines 4 to 6). At this point there is a murmur of approval from one of the other panel members (line 7). Panel member two then continues by expanding upon his opinion by noting this would be unless an offer was made for an out-of-court settlement (lines 6 and 8). He continues stating that the appellant's legal representative indicated that a letter containing such an offer was made, and that a response to this should be made by the solicitor on behalf of the appellant (lines 8 to 10). This again elicits an approving response from one of the other panel members (line 11). Panel member two continues by stating that if the offer of quantum was satisfactory then the case could be settled without the need for legal aid (lines 10, 12 and 13). Panel member two then repeats his original reason as to why he believes that the case should not be granted legal aid, noting that the sum involved is not large (lines 13 to 15).

The chair acknowledges panel member two's opinion (line 16). Panel member, one who initially believed the case should be granted legal aid, indicates a change in his opinion and concurs with panel member two (line 17). Panel member two then inquires, using the representatives first name, to check that this does not disallow the appellant's legal representative from reapplying for legal aid at a later stage if this should be necessary (lines 18 and 19). The chair replies that it does not and, after a short pause, indicates that they have

³⁵ Pleadings are: "Written or printed statements delivered alternatively by the parties to one another, until the questions of fact and law to be decided in an action have been ascertained, i.e. until issue is joined. The pleadings delivered (a) by the plaintiff, (b) by the defendant, are as follows: (1)(i) statement of claim; (ii) defence, (2) (i) reply" (Osborn's Concise Law Dictionary 1983:254). There are variations on this but they are seldom used.

reached a decision (line 20). The clerk then asks the chair if they are refusing the appeal, though uses the term "him" referring to the appellant's representative who panel member two had referenced using their Christian name (line 21). The chair confirms this (line 22), the clerk acknowledges the confirmation and a silent transition period ensues while the clerk retrieves the legal representative (line 23) from the waiting area.

Summary.

This case is interesting in that it is so neat and tidy in the way it occurs and is dealt with. A opinion in favour of granting the appeal and detailing the extent of the award is made but is responded to with a disagreement, and a reason for the refusal made. This refusal is expanded to describe a situation where the case could still proceed but without legal aid. A repeat of the reason for a refusal is made, a reason that is stated in the Legal Aid Handbook. This argument then wins round the panel member who originally held a different position and the panel come to a unanimous decision.

What this also illustrates is that, even after the appellant or their representative has discussed the case with the panel members, this does not mean that the panel members have all come to a similar understanding about the documents and the case. Instead, we can see that the panel members have interpreted the case differently. It takes further discussion between them to agree upon an interpretation in terms of the 'correct' award.

Case Seven³⁶ - (Venue - See Appendix One Venue Number Four).

This case is a female appellant who is not represented by a legal practitioner. She has a claim against a council for personal injury caused by an alleged defective paving which resulted in her breaking her leg. Initially in

³⁶ Data Session 5 tape 1 case 1.

phase one the panel have thought that the case was at least worth counsel's opinion, but had raised some issues which they wished to ask the appellant. In the second phase of the tribunal the panel discuss with the appellant details of the accident and the medical implications of the injuries. They discuss with the appellant photographs of the alleged offending paving stones and related issues. The appellant has tended to supply unextrapolated answers to questions in a quiet voice.

1 ch :right thankyou very much (.)
2 cl :okay (.)
3 ch :would you like to like to wait outside (.) erm while we consider-
4 ap : [yes
5 ch :-our decision (.) and when we've made our decision we'll call you
6 back in and we will let you know what (.) the decision is (.)-
7 ap : [right
8 ch :-(cough) (.)
9 ap :thankyou (.)
10 cl :would you like to wait just outside (.)
11 ap :right thankyou (4.0)
12 pm1 :grant limited to the close of (proceedings?) (.)
13 pm? : [ummm
14 ch :yeah weell I'd grant to close of pleadings (2.0)
15 pm2 :I would say counsel's opinion (.)
16 pm3 :no I think counsel's opinion as well (.)
17 pm2 : [mmm yeah (0.4)
18 ? :errm (6.0)
19 ch :seems to me that (.) erh (.) its a (.) fairly good (0.2) good claim
20 that she's got (.) and I (0.2) you won't get an opinion better than
21 (barrister's?) letter will you (.)
22 ? :(unclear)
23 pm1 : [there has been some more recent cases hasn't there
24 pm3 : [well there's (.)
25 nineteen seventy one (.)
26 ch :there are a lot of cases (.) err
27 pm1 : [yes there are (6.0)
28 pm2 :it's obviously not a very big case anyway and it may be th that if
29 if it (.) it might even be a case of (0.2) the insurance company
30 could be persuaded to settle before er (.) proceedings have
31 started
32 ch : [ummh (4.0)
33 cl :right I'll bring her back then (.)
34 ch :mmm (16.0)

The first eleven lines of this transcript are the end of the second 'phase' of a tribunal case hearing, in which they inform the appellant as to their next course of action and those of the tribunal panel. In doing so the chair can be seen to displaying an orientation to the phases of the tribunal described in this thesis, although he does not name them.

Initially we have the chair closing the second 'phase' discussion of the case with the appellant (line 1), this is acknowledged and 'supported' by the clerk (line 2). The chair then requests the appellant outside (line 3), which is affirmatively answered by the appellant (line 4), but the chair continues their instructions by informing the appellant of the reasons for this and outlining the course of actions that will be taken by the panel, and how this relates to the appellant (lines 3, 5, 6, and 8). The appellant acknowledges what the chair is saying while they are still talking (line 7), thus displaying that they are following the instructions, and thanks the chair when he has finished (line 9). The clerk then repeats the instructions to leave the room with the added direction of "just" in the request to wait outside (line 10). This request seems to occur while the appellant is already leaving the room and seems to be a piece of direction-giving rather than a request. The appellant acknowledges these instructions and then thanks the clerk (line 11). There then follows a short transition period of four seconds in which the appellant leaves but which contains no oral interaction between the panel.

Following the short transition period the third 'phase', the decision making, begins with statement/suggestion by panel member one that the appeal be granted and what the award should be (line 12), initially eliciting an indecisive response from one of the other panel members (line 13). This suggestion is taken up by the chair and repeated as their position also (line 14). However, after a short pause panel member two states that they would "say" counsel's opinion (line 15). This is not a suggestion that the case should not be granted, but a suggestion of a lesser award than that suggested by chair and panel member one. This disagreement to the initially suggested award is taken

up and supported by panel member three (line 16). This support by panel member three is responded to with an agreement by the panel member two which seems to be an agreement that they have chosen the right award (line 17). It seems that another panel member is about to speak, but then cuts off after just a murmuring which is followed by a long-ish silence (line 18).

The silence is broken by the chair, who had agreed with the initial suggestion of a higher award, stating that they thought the claim was a good one, and that a better opinion than the one presented in a letter submitted to the panel in the previous 'phase' could not be obtained (lines 19 to 21). This is followed by an unclear comment (line 22), which is immediately overlapped by the comment that there have been "some more recent cases" (line 23). In overlap with this, panel member three gives the date of a 'specific case' - this would appear to be the initial precedent case - (lines 24 and 25). The chair then responds that "there are a lot of cases" (line 26), which is agreed to by panel member one (line 27). Following this there is a longish pause before panel member two who had suggested the lesser award which the chair does not seem to agree with, although not directly arguing against, states that the case is "not very big" and that it is quite possible that the insurance company "could be persuaded" to settle before proceedings get underway (lines 28 to 31). This receives a token agreement from the chair (line 32). After a short silence the clerk states/suggests that he will bring the appellant back in (line 33) and receives a token agreement from the chair (line 34).

Summary.

The data displays instructions being given to the appellant at the end of the second 'phase' of the tribunal, describing the processes that the panel will be engaged in and what action the appellant will be expected to perform. This not only provides a coherent link between phases two and three, but also set up in advance the possibility of a smooth transition between the following phases.

The third 'phase' begins with a suggestion that the case be granted and

what it should be awarded, this is then agreed by the chair. From then onwards the question of the case being granted is not at issue, rather the issue becomes what it is to the nature of the award. Panel member two suggests, and is supported by panel member three, an award different to that proposed by panel member one and agreed upon by the chair, thus making a split of opinions within the panel as to the nature of the award. We see that the first two phases have not resulted in a uniform interpretation by the panel of the case documentation and newly introduced discourse from the appellant.

What is interesting here is that there is a split, not in the success of the case but in the nature of that success. Once the split becomes evident there is a pause before the chair makes a case with reference to the documentary evidence of the barrister's opinion, though not forceful for his position of a higher award. This is met with some agreement by two of the other panel members, one of whom cites a specific case, seemingly as evidence of precedence. Panel member two does not respond to this line of discussion but rather suggests that the case will probably be settled by the insurance company out-of-court. This line is not particularly responded to except by a token agreement from the chair. There is a short silence of four seconds before the clerk offers to bring the appellant back in and receives agreement on this course of action. What stands out here is that, though there does appear to be unanimous agreement as to the success of the appeal, no firm decision as to the nature of the award seems to be overtly agreed upon and yet the clerk perceives this 'phase' of the case to be finished and is not argued against or contradicted. In the transition period of sixteen seconds that follows no reference to their decision is made by any of the panel members, only once the appellant arrives is it disclosed that the award is the lower rather than the higher level. This would appear to be an incomplete decision making process in an explicit sense, yet it succeeds unproblematically for the participants as a completed 'phase'. Any implicit agreement would seem to be located in the agreement of three of the members that documentary evidence of precedent did exist, and an uncontested letter from a barrister. The letter from the barrister is not directly

referred to as counsel's opinion.

Case Eight³⁷ - (Venue - See Appendix One Venue Number Two).

The transcript starts at the beginning of the case recording.

1 ch :is she coming? (.)
2 cl :she's here (.)
3 ch :is is she coming in? (.)
4 cl :err yeah well yeah I I are you happy to (0.2)
5 pm? : [are we
6 ch :no (.) no no no no hang on a minute (.)
7 pm? : [unclear
8 cl :no she's not much (unclear) you know
9 ch : [okay (unclear) well (0.2)
10 fine (unclear) (.)
11 pm1 :I think we all have the view that if (.) if the other side's got
12 ch : [have (name) [have
13 (name) got legal aid? (.)
14 cl :let me just check (0.2)
15 pm2 :she sez so
16 pm1 : [she sez he has (11.0)
17 cl :yep he has (0.4) area six (0.2)
18 ch :then arguably then she must have it (.) because (.) ermm it its-
19 pm? : [mmm
20 ch :-quite unfair but (.) but I mean we must be even handed (0.6) I-
21 pm? : [mmm
22 ch :-mean (.) you know (.) its
23 pm2 : [can we discharge his (.)
24 ch :no (.)
25 ? :yeah (laugh)
26 cl :well you we we could certainly be putting her under (.) future
27 legal aid for the two of then could be considered (0.2) ermm (0.2)
28 pm3 :if he's got it she that's fine (.) but if (unclear) (0.2)
29 ? : [ummm
30 cl :mind sometimes it works out that they both have it for a short
31 time then you knock them both on the head (.)
32 ? :hummm (.)
33 cl :cause err its (.) you just simply can just get into a lawyers benefit
34 and that (.)
35 ch :well I think so (.) I think so (.) I mean (1.0) arguing about the-

³⁷ Data session nine tape two case 2 (5).

36 ? : [mmm
 37 ch :(.) mahogany box room fitting (.) clearly the pull string handle (.)
 38 pm1 : [ssssuh
 39 pm3 :it'll be subject to statutory charge (0.4)
 40 ? :(unclear) the toilet seat
 41 pm1 : [(laughs)
 42 ch : [(laughs) (0.4) righto (.) well I'm (.)
 43 what's the situation then in this case (.)
 44 cl :right well have ermm
 45 ch : [no hang on (mrs name of appellant miss
 46 name of appellant) she's here? (.)
 47 cl :she's here (.)
 48 ch :she's er he
 49 pm2 : [he has legal aid (.)
 50 cl :he has legal aid (.)
 51 ch :well I think we will forward her and advance her (.) her appeal- cl
 52 : [right
 53 ch :(.) err on the basis of our (unclear)
 54 cl : [yep (.) these are the other
 55 attenders (.)
 56 ch :right (unclear) (15.0)
 57 clerk leaves to get appellant, some unclear talk in the transition
 58 period then the appellant arrives.
 59 ch :(name of attender) I won't bother (name) our clerk should read
 60 any of the notes (.) I would just say and I won't even introduce us
 61 (.) ermm we have read these papers (.) over the last few days (.)
 62 we have observed in your comments that (name of opposite party
 63 in case) has legal aid (.) we have confirmed with (name) our clerk
 64 he does have legal aid and in those circumstances we will grant
 65 your appeal so that you may have legal aid (.) I have to say
 66 though that that is no guarantee that you will get legal aid
 67 throughout the proceedings (.)
 68 ap :I realise that (.)
 69 ch :right (.) good (.) okay (.) so there we are thank you for coming
 70 (.)
 71 ap :well thank you very much for (unclear)
 72 ch : [no my pleasure (.)
 73 ap :thankyou (0.2) bye bye (.)
 74 cl :bye
 75 ch : [goodbye (5.6)
 76 Appellant leaves
 77 ch :that was good and quick (1.6) now (name of next case)

This case starts with the chair asking if the appellant is coming to the appeal (line 1) to which the clerk replies that she is here (line 2), the chair asks

if she is coming in (line 3) to which the clerk stumbles a bit before replying if the chair/panel are "happy to" (line 4). The reason for this hesitation is possibly because the clerk realises the panel have not yet discussed the case ('phase one') as is 'normal' procedure, this concern is shared by one of the panel members (line 5) who speaking at the same time as the clerk starts to say "are we", presumably ready, but stops as the clerk continues to say a similar thing. The chair realises this confusion and requests the clerk to wait (line 6), there is an unclear overlap with the chair. The clerk then makes some reference to the appellant which is unclear (line 8), but this does not seem to be related to the unclear talk of the panel member but a continuation of the talk with the chair, possibly a clarification of the mix up - but this is somewhat speculative. The chair then dismisses this line of talk (lines 9 and 10).

At this point panel member one moves the talk on by suggesting that the panel all have the same view, and goes on to start explaining this (line 11). However, the chair on his second attempt interrupts panel member one to ask, using the name of the person the appellant is going to court against, if the other party to the dispute has legal aid (line 12 and 13). This appears to be along the same line of discussion that panel member one was developing (line 11), so the reason for the interruption is not clear, unless it was due to the chair believing it was his own 'role' to lead the discussion. The clerk asks the chair to let him check this information (line 14), this is done with reference to documents the panel do not have. While the clerk is doing so panel member two, with reference to the documents that the panel do have, notes that the appellant says that they do (line 15). There is a long pause after this as the clerk checks his documents and eventually confirms this and adds which Legal Aid Area Committee has awarded it (line 17). It is notable that the confirmation via the appellant's documents is not taken to be sufficiently reliable, and notable that the clerk when he confirms this adds information i.e. the awarding area, that had not been requested. It is plausible that this information may have been added to either justify the time spent checking the documents when confirmation was available from the appellants documents the panel had at hand or, to justify

why the clerk did not know already due to the award being made by another area office.

Following on from the clerk's confirmation the chair then goes on to say that the appellant must then be awarded it also if the panel are to be "even-handed" (lines 18, 20 and 22). While the chair said this, one of the panel members was giving token agreements (lines 19 and 21). Before the chair can continue panel member two inquires as to whether the panel can "discharge this" (line 23), by which they mean can they annul the award to the other party, to which the chair responds in the negative (line 24). This request by panel member two seems to indicate that they do not want to make an award to the appellant but recognise they have to if the other party in the case has legal aid, therefore if they can revoke the other award they do not have to give it to this appellant. This line of reasoning raises a laugh from some of the other panel members (line 25). The clerk responds to this line of reasoning by noting that they could nevertheless have the legal aid awards to both of them reconsidered at a future date (lines 26 and 26). Panel member three then attempts what is a reformulation or addition to this statement by the clerk, gaining some initial agreement/encouragement from another panel member (line 29), but this is not too clear (line 28).

It is the clerk who continues after this saying that it is possible for both cases to have their legal aid withdrawn (lines 30 and 31), adding that to continue is often just a benefit to their lawyers (lines 33 and 34). The panel members, themselves practising lawyers, do not appear to take the comment as relating to them and in fact the chair infers agreement by giving the example appellants arguing of small household items (lines 35 and 37). A lightheartedness prevails as panel member three states that the room fittings used in the example by the chair would be subject to statutory charge (line 39). Another panel member continues this line of humour by reference to the toilet seat (line 40). This raises a laugh from panel member one (line 41) and the chair (line 42), however, the chair continues adopting a more serious line and addressing the clerk as to the situation in this case (lines 42 and 43). The clerk begins to start, and as if to ask

a question (line 44), but is halted by the chair who asks if the appellant is here (line 45 and 46). The clerk confirms this (line 47) and the chair references the appellant but changes this to her ex-partner (line 48), but before the chair can continue panel member two seems to anticipate the chair noting that he has legal aid (line 49). The clerk repeats this in confirmation (line 50), and the chair then suggests the action and the decision the panel will take, this being that the case will be forwarded to phase four the decision delivery 'phase' (lines 51 and 53). The clerk acknowledges this (lines 52 and 54), and gives the chair a list of the other attending appellants for that day (lines 54 and 55). The chair acknowledges this (line 56) and the clerk goes out of the room to fetch the appellant (lines 57 and 58). There is some talk in the transition period but this is unclear and does not seem to relate to the case.

The appellant arrives and the chair addresses her by name and tells her that he will not bother to introduce himself or the panel, that they have considered the appeal documents and the fact that her ex-partner has legal aid (lines 59 to 63). The chair then states that this has been confirmed by the clerk and hence they will grant the appeal (lines 63 to 65), adding the caution that this is not a guarantee of continued legal aid support (lines 65 to 67). Here we see the chair divert from the 'normal' tendency to introduce themselves, the clerk and the panel at 'phase two'. The reference to the documents and the actions of the panel so far are features of 'phase two' but this is transformed into a decision via reference to confirmation of details by the clerk, which is a reference to their discussion in the previous 'phase', and the delivery of a 'granting the appeal' with reference to its possibly being temporary.

The appellant acknowledges the possible temporality of the award (line 68), and the chair then acknowledges this and thanks her for attending (lines 69 and 70). The appellant thanks the chair (line 71), this is acknowledge by the chair (line 72) and the thanks are repeated with a goodbye by the appellant (line 72). The clerk and chair both respond to the farewell (line 74 and 75) as the appellant leaves. Once the appellant has left the chair comments positively to the handling of that case and moves onto the next (line 77).

Summary.

Here we see early agreement that the case should be awarded legal aid, although there is some preference shown for both appellant and plaintiff to have their legal aid revoked. This is not a current option though, and some talk about when this may be an option is undertaken. The notable point in this case is that the decision to tell the appellant that they have decided to allow the appeal is taken in 'phase one'. Also noticeable is that the chair started off by attempting to move 'phase two' of the appeal before completing a 'phase one' (line 3). This caused the clerk to question this action, causing him to become a bit flustered (line 4), and illustrates that the clerk is attending to the 'normal' 'phases' of the tribunal. It seems likely that one of the panel members has also noticed this 'deviation from the norm' (lines 5 and 7). This concern for the deviation from the 'norm' at the beginning of 'phase one', and the lack of concern for the suggested 'deviation' at the end of 'phase one', would seem to be due to the fact that the work necessary for the move had not been done in the first instance, whereas it had in the second.

In this case we see the panel come to a decision the initial phase of the tribunal which they consider satisfactory, although a final decision is not usually an outcome of phase one but phase three, they then carry the 'logic' of this through by suggesting they inform the appellant of their decision. The second phase begins with references to the 'normal' practices of phase two, giving proof of the 'normative' way in which they are adhered to - at least in this case, with an explanation of why they are being deviated from. This explanation then develops into a delivery of a decision which would have 'normally' occurred in phase four.

What we can also see from this case is that the work that is normally performed across four phases is achieved in two. Though it must be noted that these two phases cannot therefore be seen as examples of any of the phases noted in the description of other cases in this thesis. Nevertheless, we can note the overt references by the clerk and the panel members to 'normal' practices

and deviation occurring, though it must be remembered that this is itself a situated construction of normative procedure.

Finally we have seen that it is possible to forward the tribunal 'phases', but that this can meet with resistance if the work which the panel is meant to do has not been achieved, or is no longer necessary. The panel were aware in this case when the chair asked initially if the appellant was coming in, that the work of the panel had not been done for them to satisfactorily move to the next 'phase'. This attention to the work that needs to be done before 'moving on' is displayed both by the clerk and one of the panel members. When the chair suggests forwarding the case to phase four there are no objections, this would seem to be because the clerk and the panel members realised that they have done the work which would allow this to be possible.

Case Nine³⁸ - (Venue - See Appendix One Venue Number Three).

- 1 ch :right contract (.) well this is contest isn't it (.)
- 2 pm1 : [contract
- 3 pm1 :well (.) yes ummm (0.2) that's right umm (.)
- 4 ch :but I had a copy of thee eh of that law report
- 5 pm2 : [the recent one you
- 6 mean
- 7 pm3 : [the the one in Newcastle the Newcastle one (.) is that (.)-
- 8 ch : [thee eh (.)-
- 9 pm3 :-social services (.)
- 10 ch :-scottish one
- 11 pm2 :that's in Scotland (.)
- 12 pm3 :it's newcastle on tyne now
- 13 pm1 : [newcastle on tyne yeah (.)
- 14 pm2 :with the social worker (.)
- 15 pm1 :mmmm (.)
- 16 cl :is that scottish authority (though) (.)
- 17 ch :yeah no but the one he refers to is the johnson one (0.4) the- pm2
- 18 : [(bloomsbury)
- 19 ch :-johnson and bloomsbury doesnt help him because johnson and
- 20 bloomsbury it's the junior hospital doctor where (.) there were-
- 21 pm2 : [umm

³⁸ Data session four tape two case 2 (2).

22 ch :excessive hours of work (.)
 23 pm2 : [ummm that's right (.)
 24 pm3 :yeah not quite the (same is it)
 25 ch : [(unclear) in the contract that requires them to
 26 work under twenty hours a week then it's a slightly different-
 27 pm2 : [that's right
 28 ch :-thing you see (.) I mean here (1.2) erm it seems to be just
 29 general stress at work (.) well I mean general stress arising out of-
 30 pm2 : [umm
 31 ch :-his job (.) It's a little bit thin on sort of (.) specific (.)
 32 pm2 :but he he can obviously (.) to some extent rely upon the (.) erm
 33 (.) success in the industrial tribunal although it wasn't contested -
 34 ch : [ummm
 35 pm2 :-the fact that he had an award (0.2) and that (.) is is something- ch
 36 : [ummm
 37 pm2 :-he err (.)
 38 pm3 :well what's he (going to court) for (.)
 39 pm2 :errrm (.) unfair dismissal
 40 pm1 : [well well erm yes that award that award but it that would be
 41 based upon fact that they failed to implement proper procedures-
 42 pm2 : [umm
 43 pm1 :-(.) I mean I think based upon that newcastle social workers case
 44 he might (.) and it's very much a might and I do accept that (.)
 45 have grounds for an argument but I would certainly limit it (.)- pm2
 46 : [umm
 47 pm1 :-very strongly (.) I would limit it to a very low (.) financial
 48 amount and I would say counsel's opinion only (.) plus (.)
 49 counsel's opinion and and a and a low a low financial (.) yes yes-
 50 pm2 :[umm
 51 ch : [around five hundred
 52 pm1 :-five hundred costs yes (.) perhaps seven fifty (.)
 53 pm3 : [I I I uh
 54 ch :seven fifty including costs (.)
 55 pm1 :including costs yes (.)
 56 pm3 :that' what I
 57 pm2 : [I I agree I think it's going to be difficult but I think
 58 it's not by no by no means hopeless (.)
 59 pm1 :yeah (0.1)
 60 pm3 :that's my view (.)
 61 pm2 :it's new territory as well
 62 pm1 : [yes a new territory interesting (.)
 63 ? :yeah (0.2)
 64 cl :right (.) I'll bring him in then (0.1)
 65 Clerk leaves to get attender
 66 ch :so we're just going to tell him (.)
 67 pm2 :mmmm (.)

68 pm1 :if you're happy to (laugh) (0.4)
 69 pm2 :what the upshot (unclear) try and persuade us that he he's
 70 (unclear) but I don't suppose for a minute will (.) do anything
 71 other than the great (unclear)
 72 ? : [(laugh)
 73 Some unclear talk ensures at a rapid pace then a pause (2.0)
 74 pm1 :wh wh what financial limits are we going to set (.) what do you
 75 think seven fifty (.)
 76 ? :okay (.)
 77 pm3 :yeah inclusive oh inclusive oh yeas (.)
 78 ch :ahem (.)
 79 [unclear comment made as clerk returns with the appellant]

The case starts with a lot of flicking through of documents and with the chair stating the character of the case as being about contract (line 1), with panel member one giving a heavily overlapping repetition and confirmation of this characterization of the case (line 2), and the chair continuing by categorizing the case also as "contest" and seeking agreement on this (line 1). This is somewhat hesitatingly confirmed by panel member one (line 3). The chair then goes on to state that they had a copy of "that law report" (line 4), the panel then enters into a discussion to clarify exactly which report he chair is talking about. Panel member two asks if the chair means "the recent one" (line 5 and 6), panel member three asks if the chair means the "Newcastle one" (line 7). The chair adds that he means the "Scottish one" (line 8 and 10), to which in overlap panel member suggests the chair means "social services" (lines 7 and 9) to which panel member two states "that's in Scotland" (line 11). Panel member three corrects panel member two by stating that is Newcastle (line 12) to which panel member one adds their agreement with panel member three (line 13). Panel member two clarifies that the report they are talking about is the one concerning a social worker (line 14) which panel member one confirms (line 15). The clerk queries if the case in the report from Newcastle was under Scottish authority (line 16). The chair initially responding to the clerk but then correcting himself states that the case that the report he has referred to (back at line 4) and that the appellant's documents refer to is the Johnson and, as he is informed by panel member two (line 18), Bloomsbury case, about the junior

hospital doctor. This report he informs the panel is the case of excessive hours of work and does not help the appellants case here (lines 17, 19, 20 and 22), which panel member two acknowledges (lines 21 and 23) and panel member three acknowledges that the case report and the case the tribunal are "not quite the same" (line 24).

The chair then goes on to report what he sees as the difference between the appeal case they are reviewing and the case report produced in its support as providing a precedence for it. Firstly he states the nature of the reported case (lines 25 and 26), receiving an agreement token from panel member two (line 27), then contrasts this with the case the tribunal is sitting on (lines 26, 28, 29 and 31). The chair also then adds that he thinks that the case documentation for the case they have to decide upon is a bit weak on "specifics" (line 31).

As noted above, the chair, after the panel has managed to focus on the case and organized what the relevance of the case report referenced by the appellant is, has moved to making an assessment of the case in hand noting he thought it was a "little thin on sort of (.) specifics" (lines 29 and 30). Following this panel member two notes that the appellant can "to some extent rely" on their success in a industrial tribunal that the case had previously been to before (lines 32, 33, 35 and 37). After this panel member three seeks to clarify why the appellant is taking the case to court (line 38), to which panel member two replies "unfair dismissal" (line 39). At the same time i.e. slightly overlapping the previous utterance, panel member one outlines the specific claim of the case, "a failure to implement proper procedures". Then invokes the Newcastle case involving the social worker which was the source of some earlier confusion, to note that the case they are assessing "might" have an "argument", adding that they would limit the monies "very strongly" and only for counsel's opinion (lines 43 to 45 and 47 to 49). This talk of the limitations of the award of legal aid implies the decision that the case should be granted its appeal, this aspect of the statement is not contested and the deliberations of the award amount by the panel begin.

The chair suggests the sum of five hundred pounds (line 51), to which

panel member one seems to initially agree to but suggests seven hundred and fifty pounds (lines 49 and 52), which the chair then modifies to "seven fifty including costs" (line 54) to which panel member one agrees (line 55). Panel member two then agrees with the assessment so far, reiterating that it may be difficult but the case is not a hopeless one (lines 57 and 58). It is worth noting that it was perhaps panel member three who was attempting to take a turn twice earlier, but did not continue and rather let the chair and panel member two continue (lines 53 and 56). Panel member one adds their agreement to panel member two's assessment (line 59), to which panel member three states that this is their view too (line 60). Although that is all the panel members agreed, panel member two adds further support for the case by stating that the case will be covering new territory (line 61), to which two of the other panel members voice their assent (lines 62 and 63). At this point the clerk who has been monitoring the panel members assess the panel as having decided upon a course of action and indicates that they shall bring in the appellant, and goes out to do so (line 64).

When the clerk leaves to get the appellant (line 65) the chair then proffers the notion that they are just going to tell the appellant their decision (line 66), to which panel member two agrees (line 67) and panel member one by stating explicitly if the chair is "happy to" (line 68). Following this panel member two starts talking and although it is not quite clear what he is saying all the time, it appears to be what he suspects the appellant will say to the panel if they start asking questions to the appellant about the case (lines 69 to 71). It seems that panel member two's utterance elicits a laugh from one of the panel members (line 72), however it would seem to be giving support to the decision of the chair as to how to continue the case hearing. Following this there is a piece of unclear talk (line 73), and then panel member one asks the chair about what financial limits to the award they are going to set suggesting "seven fifty" (line 74 and 75) and a panel member agrees (line 76). Panel member three adds that this should be inclusive (line 77). Following this the chair clears his throat (line 78) as the clerk returns with the appellant (line 79).

Summary.

What we can see occurring in the initial phase of this case is the panel discussing whether a case cited and report referenced by the appellant on behalf of their case as being applicable or not. However, some confusion has arisen due to some of the panel members believing the report the chair is referring to is actually another case, a case from a Newcastle court involving a social worker, rather than a Scottish case involving a junior doctor. Some of the confusion seems to be due to a belief by some of the panel that the Newcastle case will support the appellant's case, but this only becomes fully clear later. The initial activity of the case so far has been on the panel members all orientating to the same document, the case report involving a junior doctor in Scotland, as referenced by the appellant. From the initial confusion the turn-taking involving all the panel members including the clerk, each putting in their own observations, eventually results in the recognition of the cause of confusion and the chair being able to dismiss the report cited. It is worth noting that once the two cases are identified as being separate, the confusion is lifted instantly without any need for clarification of the Newcastle case or reference to the case itself.

The chair then contrasts the report on the Scottish case with the current case and notes their differences, he then states that he finds the current case a bit weak on specifics. Having sorted the documentation out initially this seems and having focused their attention this appears as a move to a preliminary agreement on the merits of the case (lines 28, 29 and 31).

Following this we see that from a criticism by the chair as to the lack of specifics in the appeal document, first panel member two and then panel member one support the appeal although with the latter especially noting the possibility of difficulties for the case in court. Of interest though is how panel member two's suggestion for a course of action is taken up, with only slight amendment by the chair, as non-problematically the decision of the tribunal on the case. The worthiness of the case and its attendant documentation is not

discussed as being problematic, even though it initially seemed as though the chair believed the documentation to be a "bit thin on .. specifics" earlier on (line 31). Rather, panel member two's suggested course of action is followed by agreement and consensus building to the extent that the clerk believes the panels deliberations to be suitably complete. However, the panel had not decided on any questions to ask the appellant whom the clerk has gone out to collect, nor have they decided on any other course of action.

We see here the transition period being used to perform work that was not finished before the clerk went to fetch the appellant. That work being what the panel are going to say to the appellant. Although the panel has not discussed the next piece of work the chair suggests that they inform the appellant of their decision, this can be seen as a deviation from the 'normal' pattern of work when an appellant is in attendance, in that they would 'normally' talk the case over with the appellant then discuss again their decision on the case and then inform the appellant (see previous sections of this chapter). However, in such a 'normal' case they would have decided on some issue which they wished to discuss with the appellant which they have not done in this case, rather they have already come to a unanimous decision in favour of the appellants claim. The chair seems to acknowledge this deviation from the 'norm' in the suggestion that they just "tell him" (line 66), and seems to be recognised as such by panel member one when they respond with "if you're happy to" (line 68). The rest of the panel also give assent to this proposed course of action.

Although direct reference is made to the change in practice from 'normal' procedure does make reference to this deviation in the transition period, the four phases do not adequately describe this adaptation of the transition period into the final decision-making occasion.

Case Ten³⁹ - (Venue - Appendix One Venue Number Three).

³⁹ Data session four tape two case 4 (5).

The panel have moved onto phase two without having decided to inform the that they are refusing the case, in this they seem to be following the 'normal' four phase route. Phase two does allow the presentation of new evidence, so the panel are unlikely to have decided to definitely to refuse the case, but to do so if the appellant can not provide evidence to overturn the decision by the area office. After introducing the appellant to the panel they inform the appellant of the current situation. The appellant believes that he and his solicitor, while in conference with the barrister, were told by the barrister that it had a greater than fifty percent chance of success, which would make it eligible for legal aid. The appellant does not produce any new documentation and as the tribunal panel have the document giving the barrister's opinion they can not grant legal aid. In this case such evidence would probably have to be a second barrister's opinion assessing the chance of the case's success in court as being fifty per cent or higher. The appellant is challenging the original document but this is not accepted by the panel.⁴⁰

Phase two is quite long in this case, the appellant goes into a detailed description of the events that have ended up in the current appeal against the refusal of legal aid. The panel however, will not move beyond the document provided by the barrister. The appellant believes that there has been a mistake, especially as he believes he was told in conference to put the case down for court, and that the panel, presented with his appeal, can overturn the barrister's written opinion of the case. The chair has informed the appellant that panel do not have authority to do this and this is where the transcript starts.

1 ch : [well it does sound strange but there's no
2 there's no letter from mister (solicitor's name) err (.) suggesting
3 that (.) the opinion given is different to the one given in
4 conference (.) and I'm afraid given the err the opinion we have

⁴⁰ What is interesting here is that the appellant's solicitor who was supposedly present at the alleged original verbal assessment of success at fifty percent or more is not present. If the solicitor had been present it would have been interesting to see what the outcome would have been if they had challenged the accuracy of the barrister's document.

5 now (.) that we have no alternative (.) mister (appellants name) but
 6 to say that we must dismiss your appeal (0.2) if you want to go
 7 back and talk to mister (solicitor's name) about it he will advise
 8 you as to what you might be able to do next (.) errah but given the
 9 (0.2) the advice (.) in writing from mister (name) of counsel (0.2)
 10 which puts your chances at under fifty per cent (.) errm (0.4) then
 11 we have ah (.) no alternative in the present circumstances I'm
 12 affraid but to dismiss that appeal (0.6)
 13 ap :so (0.2) don't a (0.2) so (1.2)
 14 ch :what happens now well you go back and discuss with mister
 15 (solicitor's name) what happens now I think is the answer (1.0)
 16 ap :yeah but (.) like a say I mean you're dismissing it on the (0.8)
 17 grounds of what the barrister said (0.4) and a've come to appeal -
 18 ch : [ummm a p
 19 :so (2.0) that's not much of appeal (0.6) because like (0.4) you- ch
 20 : [umm
 21 ap :-know what he sez in the first place I know what he sez
 22 ch : [no (.)
 23 we only know that he said forty per cent to you in conference and
 24 fifty in his written und erh less than fifty per cent in his written
 25 advice that's all we know on that (0.4) you're telling us he said
 26 fifty per cent in conference (.)
 27 ap :quoted fifty per cent und then he said forty
 28 ch : [well (0.2) we can't go behind that (.)
 29 you go back and discuss it with mister (solicitor's name) mister
 30 (solicitor's name) may advise you as to what might be able
 31 to do (.) in terms of perhaps getting another opinion from a
 32 different barrister (.) which might leave you in a position to make
 33 a fresh application for legal aid (.) but (0.2) that would have to be
 34 a very strong opinion I think to get over (slight laugh) this one
 35 (0.2) but we are left with this opinion now (1.6) what we are
 36 saying is as I said to you at the beginning of this hearing we are
 37 not here to try the case we are not the judge (.) I know you say "I
 38 don't agree with it" but we cannot we have to accept the advice
 39 that you have been given by your barrister (.) he's acting on your
 40 side (.) and the advice he's given is that it's less than fifty per cent
 41 (.) and we are not here on this appeal to say well let's make our
 42 own minds up on what your chances are (3.0) we're here to say
 43 (.) we've seen the facts there is no evidence the barrister was (.)
 44 totally misdirected himself (.) and therefore we must we must
 45 accept his assessment (3.0) right (.) so that's it I'm afraid the
 46 appeal is dismissed and I suggest you go back to you solicitor
 47 mister (name) and discuss with him what happens now (1.4)
 48 ap :right then (.)
 49 ch :thank you
 50 cl : [thankyou

51 ap : [okay then cheers (.)
52 ch :bye bye
53 cl : [thanks bye (6.0)
54 ch :pffhhhh (.)
55 cl :next one is mister (appellants name)

At the point we take up the transcript we have the chair acknowledging the concerns of the appellant as to the report contradicting their understanding of the opinion of the barrister. The chair notes however, that there is no letter from the appellants solicitor to support this report of contradictory opinions by the barrister, and that the panel therefore have no option but to dismiss the appellants appeal (lines 1 to 6). The chair suggests that the appellant may wish to go back to their solicitor to be advised what to do next (lines 6 to 8), but repeats, noting the fifty percent chance of success rule and the barrister's document which puts the case's chances of success at less than that, that they have no option but to dismiss the appeal (lines 8 to 12). The appellant hesitantly starts to ask a question but halts leaving a longish pause (line 13) before the chair informs the appellant that what happens next is that appellant talks to their solicitor (lines 14 and 15). The chair displays (line 15) that this information is an answer to what he believes the appellant was about to ask (line 13).

The appellant then states that the panel is dismissing the case in light of the report from the barrister (lines 16 and 17), the chair gives a token acknowledgement to this (line 18), and that he has come to appeal (lines 17 and 19), this also gets a token acknowledgement from the chair (line 20). The appellant continues by saying that it is not much of an appeal (the appellant means that he has not been given much of an appeal) since they both know already what the barrister said in the first place (lines 19 and 21). The chair responds quickly contradicting the appellant and the stating that all the panel knows is that the barrister said forty percent to the appellant in conference and fifty in the written document (lines 22 to 24). This is the wrong way round and the chair immediately corrects himself and adds that they only have the appellant saying that the barrister said fifty percent chance in conference (24 to 26). The appellant then makes what seems to be a late correction to the earlier

mistake of the chair, putting the percentage chances in a correct temporal order (line 27). The chair, overlapping the end of the appellants correction, states that the panel can not "go behind" the barristers statement, and repeats his suggestion that the appellant see his solicitor as a next course of action (lines 28 to 31). The chair adds to this a suggestion as to what the solicitor may then advise, that he may suggest another barrister's opinion and a re-application for legal aid, but adds, with a slight laugh in his voice, that it would have to be a strong new opinion (lines 31 to 34). The chair then states, noting that he told the appellant this when he first came in at the beginning of phase two, what the role of the tribunal is and that they have to accept the advice the appellant has been given by their own barrister, and not make their own decision (lines 35 to 42). There is a pause then the chair continues to spell out the panels role, that they have seen the barristers decision, that is does not look problematic and that they therefore must accept it (lines 42 to 45). There is another pause then the chair continues again telling the appellant that the appeal is dismissed and suggesting that they go back to their solicitor to see what happens next (lines 42 to 47).

The appellant, in not attempting to prolong and extend the discussion, appears to accept this as the final decision of the panel (line 48). The chair then thanks the appellant (line 49), as does the clerk (line 50), and the appellant acknowledges these and says goodbye (line 51). The chair and clerk reciprocate this goodbye (lines 52 and 53) and there is a pause as the appellant leaves. After the appellant leaves the chair give an audible exhale at the ending of the appeal (line 54) and the clerk introduces the next case (line 55).

Summary.

This case is an appeal which in 'phase one' the panel are agreed upon the interpretation of the case documents which they had received prior to the tribunal. That they indicated that the case should be refused legal aid and that this opinion meant the appeal should be refused as it stood at that point in time.

However, since the appellant can introduce new material at the tribunal, and they can not refuse the appeal without checking this, they move on to 'phase two' to discuss the case with the appellant. However, in 'phase two' it becomes evident to the panel that the appellant does not have any new material to present before the tribunal. Once the chair has established this he can be seen to develop the discussion with the appellant, informing the appellant that the panel are not able to grant the appeal against the refusal of legal aid and in so doing delivers the decision of the panel as being such. The chair does this without moving the tribunal to 'phase three', the reason that the chair can do this is because it was established that the case warranted a refusal unless new material was made available, and since it has not been the chair can presumably assume the panel's opinion on the case. The appellant has raised some issues about the case with the panel but these have not affected the key point of the appellants own barrister's opinion which is unfavourable towards the appellant. As none of the panel has taken the appellant's information to override their initial view, by raising this in the discussion with the appellant, the chair assumes previous position of the panel and informs the appellant of the refusal without proceeding to 'phase three'. The chair does this, and in doing so differs from the two previous examples of foreshortening, without conferring with the other panel members. This case also differs in that not overt reference is made to the 'four phase' 'norm', by the panel members or the clerk. Even if the panel get through the work that is associated with the four phases that have been described throughout this thesis as evident in other cases, this does not mean that the panel have been attending to the four phases in a way that describing their activities with reference to such a model would not be a distortion.

It is notable that in this case the panel are not allowing any testimony of the appellant to allow an amendment to the situation depicted in the documentation. The barrister's report as a document is being accorded a status that is not necessarily accorded to other documentation, in that its content is being taken as unambiguous. This would seem to indicate that all documents are not accorded the same status as representations of external situations, this does

not necessary mean that they are better representations, but that they are accorded institutionalised legitimacy, that causes their contents to be accorded a much narrower negotiable meaning. A meaning that is designed to be referred to in specific bureaucratic processes and practices. Although the relevance of the document and its content still require situated negotiation and application. This case displays what appears as a phase two initially to be transformed due to situational circumstance to be transformed, not into a phase four, but into something that is neither.

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